50-CENT A GALLON WHISKEY TAX ACT CASE.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 439.

CHARLES I. DAWSON, ATTORNEY GENERAL OF THE STATE OF KENTUCKY, ET AL., APPELLANTS,

vs.

KENTUCKY DISTILLERIES & WAREHOUSE CO., APPELLEE.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

BRIEF FOR APPELLEE.

LEVY MAYER,
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Statement of the Case.

This appeal involves the validity, under both the Federal and State Constitutions, of an act of the Kentucky Legislature approved March 12, 1920, known as the "50-cent a Gallon Tax Act," which imposed a so-called license or occupation tax of 50 cents per gallon on every gallon of the approximately 30,000,000 gallons of whiskey then in bonded warehouses in Kentucky, which should thereafter be—

(1) Tax-paid and withdrawn from bond, or

(2) Transferred in bond *from* Kentucky to any point *outside* the State.

For many years prior to March 12, 1920, the Kentucky Distilleries & Warehouse Co. (hereafter called the Kentucky Co.) had owned and operated various United States bonded warehouses in Kentucky, in which, on that date, were stored large quantities of whiskey that the Kentucky Co. had manufactured more than five years previously, to wit (R., 4-7):

(1) 250,000 gallons owned by the Kentucky Co.

(2) 8,000,000 gallons owned by various people throughout the United States, who held the Kentucky Co.'s warehouse receipts therefor.

From day to day large quantities of whiskey, both its own and that of its customers, (1) were being shipped, *in bond*, from Kentucky to other States in the course of interstate commerce; or (2) were being tax-paid and removed *from* bond in Kentucky (R., 7-9)—all for non-beverage purposes. The laws of the United States expressly provide for the transfer of whiskey, in bond, from one warehouse to another warehouse in the same State, *or in other States*, or for export.

So far as is relevant to this appeal, the following is

The Proper Construction of the Act.*

The Act provides (R., 14-17):

I. That every whiskey warehouseman shall pay a tax of 50 cents on every gallon of whiskey that is (*a*) withdrawn from bond, or (*b*) *transferred, under bond, from Kentucky to any place outside the State* (§1, 3).

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* Although the act is easily susceptible of a construction that would render it clearly void, yet in view of the principle that every reasonable construction of a statute must be resorted to (even

II. That the warehouseman shall make monthly reports to the State Auditor of the number of gallons so withdrawn from bond or transferred, in bond, to points outside the State; and shall simultaneously pay to the auditor 50 cents on each gallon so withdrawn or transferred, whether owned by the warehouseman or not (§2, 3); and that, to secure the payment of such tax, the State shall have a lien on the warehouse and on all other whiskey (whether belonging to the warehouseman or to his customers) stored therein (§3).†

III. That the warehouseman shall pay a fine of from $500 to $1,000 for *each day's* default in filing the report or in paying the tax (§5).

The Kentucky Co. filed this suit in the Federal court to enjoin the proper State officials (who were charged with the duty of enforcing the Act and of prosecuting those persons who failed to pay the taxes imposed thereby) (1) from indicting or otherwise attempting to prosecute or collect from the Kentucky Co. the penalties prescribed by the Act, and (2) from enforcing the lien for the taxes against the Kentucky Co.'s property (R., 9-12).

The bill alleged that the Kentucky Co. was a warehouseman, owning in its own name and having on storage for others large amounts of whiskey, which were stored in its bonded warehouses in Kentucky; that since March 12, 1920,

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though such construction be not the most natural or obvious one) in order to save it from unconstitutionality, we are disposed (in the absence of any decision by the State court) to accede to the construction urged by the Attorney General (Brief, pp. 37-39), that the tax is not literally an "annual" tax of 50 cents per gallon per year, but is merely a single tax of 50 cents on each gallon that is (a) withdrawn from bond in Kentucky, or (b) transported in bond from Kentucky to another State.

†The warehouseman must primarily pay the tax on whiskey so withdrawn or transferred outside the State; but where the whiskey belongs to third parties the warehouseman is subrogated to the State's lien to secure reimbursement from the owners for the taxes so paid.

it had already withdrawn from bond and transferred, in bond, from Kentucky to points outside Kentucky (and was daily continuing so to do), large quantities of whiskey; that the defendants were insisting on the filing of the report and the payment of the taxes under the Act and were about (1) to prosecute the Kentucky Co. for its failure to do so, and (2) to enforce against the Kentucky Co.'s property the alleged lien for the taxes.

On a motion for an interlocutory injunction, heard before three judges (Judicial Code, §266), the injunction was granted (R., 84-86), and an elaborate opinion in a companion suit (*Freiburg case*) was filed and adopted in this case, except as to one point not here involved (R., 52-83).

SUMMARY OF POINTS DISCUSSED.

1. So much of the Act as imposes a tax of 50 cents a gallon upon each gallon of whisky transferred, in bond, from warehouses in Kentucky to any point outside of Kentucky, is unconstitutional, because in conflict with the Commerce Clause" of the Constitution.

2. The provision for imposing a tax on whisky transferred, in bond, out of the State is an inseparable part of the statute, and being invalid, renders the entire Act void

3. (Here insert third point.)

4. The Act is unconstitutional because it is not such a license tax special or excise tax as is authorized by the Kentucky Constitution § 181.

5. The Kentucky Co. properly resorted to equity, as there is no adequate remedy at law.

FIRST POINT.

So much of the Act as imposes a tax of 50 cents a gallon upon each gallon of whiskey transferred in bond from warehouses in Kentucky to any point outside of Kentucky is unconstitutional, because in conflict with the "Commerce Clause" of the Constitution.

The Act provides that every person engaged in the business of owning and storing whiskey "in bonded warehouses in this State" shall pay a tax of

> "fifty cents on every *proof* gallon of said distilled spirits * * * withdrawn from a bonded warehouse *or transferred therefrom under bond out of the Commonwealth of Kentucky*" (§1, R., 14).

And (§3, R., 15):

> "Shall * * * pay [monthly] to the Auditor of Public Accounts the tax of fifty cents per *proof* gallon upon each *proof* gallon of such spirits * * * *transferred under bond out of this State*."

Under the United States internal revenue laws, there are two kinds of bonded warehouses, to wit, "distillery bonded warehouses" and "general bonded warehouses."

By those laws whiskey may be transferred "under bond"

> "1. From distillery warehouses to general bonded warehouses located in the same or in another district.
>
> "2. From one general bonded warehouse to another general bonded warehouse in the same or in another district" (act August 28, 1894, §§51-55; 28 Stat., 509, 565; Regulation No. 20, pp. 15-26).
>
> 3. From distillery warehouses to foreign countries —exported (R. S., 3330 as amended; 4 Fed. Stat., Ann., 82; U. S. Comp. Stat. 1916, §6125; Regulation No. 29, revised).

The Commissioner of Internal Revenue has prescribed elaborate regulations (with the force of law) covering the bonds, procedure, etc., in those respective cases (*id.*).

The present Act of the Kentucky Legislature (as construed by the State authorities) does not impose any tax whatever on whiskey, no matter how freely transferred in bond from one point in Kentucky to another point in Kentucky, whether from a distillery warehouse to a general bonded warehouse or from one general bonded warehouse to another.* But it imposes the 50-cent tax on whiskey which is transferred in bond from a distillery or general bonded warehouse in Kentucky to (*a*) some general bonded warehouse *outside* of Kentucky, or (*b*) some *foreign country*.

No matter by what name it is called, nor for what alleged purpose it was passed, the Act imposes a direct tax of 50 cents on every gallon of whiskey which is transported, in bond, from Kentucky to any point *outside* of Kentucky.

Without dwelling upon the proposition that when Congress, under its power of taxation and to regulate commerce, has prescribed the detailed terms and conditions under which whiskey may be transferred, in bond, from Kentucky to points outside, such action is equivalent to a declaration that such transportation shall be free of State interference and taxation, we come directly to the fundamental proposition that, while a State may tax all property within its limits *as* property, even though it be transported to another State, yet it cannot make the imposition of the tax *dependent* upon the transportation of the property to another State.

There are so many authorities directly in point that it is not necessary to rest upon, or to seek analogies in, those countless cases where it has been held that State statutes were in conflict with the "commerce clause" because they operated as a burden upon, or to interfere with, the freedom

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*The ATTORNEY GENERAL concedes this in his Brief, p. 41, saying: "It is only when the liquor is *removed from bond*, or transferred under bond *out of the State* that the tax becomes due."

of interstate commerce, on account of taxes upon receipts, or capital stock, or license fees, etc.

In the *Passenger Cases*, 7 How., 283, and *Crandall vs. Nevada*, 6 Wall., 35, as subsequently extended in *Case of State Freight Tax*, 15 Wall., 232, at page 281; *Henderson vs. Mayor*, 92 U. S., 259, and *People vs. Compagnie Gen. Transatlantique*, 107 U. S., 59, it has been finally settled that a State cannot impose a tax on a person coming into or passing out of a State, for the reason that the passage of persons between the States is interstate commerce, and that a tax on a person so moving is in conflict with the Federal Constitution. (See also *People vs. Pacific Mail*, 16 Fed., 344.)

The same rule applies to commodities.

In *Almy vs. California*, 24 How., 169, as explained in *Woodruff vs. Parham*, 8 Wall., 123, 138, it was held that a stamp tax on bills of lading for the transportation of gold or silver from points within California to any point without the State was unconstitutional, because it was in effect a tax upon the gold or silver so transported.

In *Case of the State Freight Tax*, 15 Wall., 232, a Pennsylvania statute required each railroad to make a quarterly report of the amount of freight carried, and to pay from 2 to 5 cents (according to the commodity) on every ton of freight carried by it. The statute was held unconstitutional as applied to freight carried from within the State to points out of it, or carried from without the State into it, because in violation of the commerce clause. It was a tax directly upon each *ton* of freight carried, just as in the case at bar it is a tax upon every *gallon* of whiskey carried in bond from the State to a point outside of it.

This court said that it was a tax *upon* freight carried between the States, a tax *because* of its transportation, a regulation of interstate commerce, and void because (pp. 279, 281)—

> "No State can impose a tax upon *freight* transported from State to State, or upon the transporter, *because* of such transportation."

It was also pointed out (pp. 276, 277) that the statute was not saved from unconstitutionality because the State imposed a similar tax on freight moving only in *intra*state commerce. *A fortiori*, the Kentucky statute is bad because it *exempts* from taxation whiskey transported in bond from one warehouse to another *within* the State, but *imposes a tax* upon a similar transportation from a warehouse within the State to another *without* the State.

In *Telegraph Co. vs. Texas*, 105 U. S., 460, a Texas statute imposed an occupation tax of one cent for every full-rate message sent, and one-half cent for every message less than full rate. It was in no sense a tax on receipts nor on capital stock, but it was a flat tax of a specified sum on every message sent, whether it was long or short, whether going five miles or a thousand miles. The telegraph company sent from its Texas offices a great many messages, of varying lengths and to varying distances, many of which went to places outside of the State.

This court held the tax invalid as to messages sent from Texas to points outside of the State, saying (p. 465):

> "* * * it may undoubtedly be taxed in a proper way on account of its *occupation* and its business. The precise question now presented is whether the power *to tax its occupation* can be exercised by placing *a specific tax on each message sent out of the State*. * * *
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> "In *Case of the State Freight Tax* (15 Wall., 232) this court decided that a law of Pennsylvania requiring transportation companies doing business in that State to pay a fixed sum as a tax 'on each two thousand pounds of freight carried,' without regard to the distance moved or charge made, was unconstitutional, so far as it related to goods taken through the State, or from points without the State to points within, or from points within to points without, because to that extent it was a regulation of foreign and interstate commerce. In this the court but applied the rule, announced in *Brown vs. Maryland* (12 Wheat., 419),

that where the burden of a tax falls on a *thing* which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury. In that case it was said a tax on the sale of an article imported only for sale was a tax on the article itself. To the same general effect are *Welton vs. State of Missouri*, 91 U. S., 275; *Cook vs. Pennsylvania*, 97 *id.*, 566; and *Webber vs. Virginia*, 103 *id.*, 344. Taxes upon passenger carriers of a specific amount for each passenger carried were held to be taxes on the passengers in *Passenger Cases*, 7 How., 283; *Crandall vs. State of Nevada*, 6 Wall., 35, and *Henderson vs. The Mayor*, 92 U. S., 259. Taxes on vessels according to measurements, without any reference to value, were declared to be taxes on tonnage. *State Tonnage Cases*, 12 Wall., 204; *Peete vs. Morgan*, 19 *id.*, 581; *Cannon vs. New Orleans*, 20 *id.*, 577, and *Inman Steamship Co. vs. Tinker*, 94 U. S., 238.

"The present case, as it seems to us, comes within this principle. The tax is the same on every message sent, and *because* it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent, the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full rate, the tax is one cent, and if less than full rate, one-half cent. Clearly, if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried, a tax on the passenger, or for the sale of goods, a tax on the goods, this must be a tax on the messages. As such, *so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce and beyond the power of the State.* That is fully established by the cases already cited."

That is a controlling authority.

In the case at bar the tax is 50 cents on every gallon of whiskey (regardless of value, age, or distance) sent, in bond, out of the State.

In *Pickard vs. Pullman Southern Car. Co.*, 117 U. S., 34, Tennessee imposed a privilege tax of $50 on each sleeping car owned by a Kentucky corporation, which car was run by another corporation over its railroad in Tennessee. It was held that the tax was void with respect to the cars which were used to run in and out of the State. The opinion cites and reviews many prior authorities. This was followed in *Allen vs. Pullman Co.*, 191 U. S., 171.

Indeed, the law has become so well settled that a State cannot impose on any article a tax which attaches upon or because of the transfer of the article from or into a State that the State legislatures have generally abandoned the attempt; and it is something of a curiosity here to see a revival of that long-discredited theory.

In *Oklahoma vs. Kansas Nat. Gas. Co.*, 221 U. S. 229, 255, an Oklahoma statute which, under the guise of purporting to govern domestic corporations and to prescribe the conditions under which foreign corporations might be admitted to the State, prohibited them from transporting natural gas from Oklahoma into other States, was held unconstitutional, as in violation of the commerce clause. The court said:

> "Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the

> Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be hailed at State lines. And yet we have said that 'in matters of foreign and interstate commerce there are no State lines.' In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States, and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court."

If a State cannot prohibit its products from being carried by the owner into another State, neither can it accomplish the same result indirectly by taxing (to the point of prohibition) a product carried from one State to another, because if the State has a right to impose a 50-cent tax on each gallon of whiskey transported, in bond, from Kentucky to other States, it may make the tax as high as it pleases; for, once conceding the power to tax, the extent to which the power shall be exercised, is a matter for the legislature and not the courts.

The *Oklahoma Gas Case* is pertinent in another aspect. The statute, while permitting the transportation of natural gas over the highways *within* the State, denied the use of the highways to corporations desiring to transport the natural gas to points *outside* of the State.

The court said (p. 262):

> "We place our decision on the character and purpose of the Oklahoma statute. The State, as we have seen, grants the use of the highways to domestic corporations engaged in intrastate transportation of natural gas, giving such corporations even the right to the longitudinal use of the highways. It denies to appellees the lesser right to pass under them or over them, notwithstanding it is conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the State to make. As said by the Circuit Court of Appeals for the Eighth Circuit, no State can by action or inaction prevent, unreasonably burden, discriminate against or directly regulate interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends."

In the case at bar, the Act permits any one to transport whiskey, in bond, freely, without the payment of any tax, from a point within Kentucky to another point *within* Kentucky; but the moment whiskey is transported, in bond, from a point in Kentucky to a point *outside* of Kentucky, the warehousemen must pay 50 cents a gallon tax. If that is not a direct tax on interstate commerce, the English language has lost its meaning.

In support of his contention that the tax is *not* upon the whiskey transported in commerce, but is a mere occupation or license tax upon "the business of owning and storing the whiskey in bonded warehouses as a separate business," the ATTORNEY GENERAL says (Brief, pp. 42, 43):

> "Persons who store liquor in bonded warehouses do so for a certain definite purpose. One is to permit it to age, so that it may be bottled in bond and then sold to the trade. To do this, under Government regulations, it must remain in storage and age for four years. This is undoubtedly doing something *which is a necessary part of the business of manufacturing*

> *and selling liquor.* Another purpose in storing liquor in a bonded warehouse is that which animates all persons who store in a public warehouse, viz., *to have some person in charge and in keeping of the goods and responsible therefor.* Another reason for the storage is to avoid payment of Government taxes until a sale has been secured for the product stored. It would seem that a person engaged in the liquor business to any extent would undoubtedly have to engage in these particular acts in order to so engage in business."

That contention was made, considered, and adversely disposed of in *Heyman vs. Hays,* 236 U. S., 178, where a privilege tax for carrying on a wholesale liquor mail-order business in Tennessee with persons in other States was held to be invalid. The Tennessee State court had upheld the tax upon the ground that it was imposed, not upon the interstate business, but upon the privilege of doing business in Tennessee, the nature of which was thus summarized in the opinion of the Supreme Court (p. 185):

> "(1) The existence of the goods in the State, held in a warehouse as stock susceptible of being sold in the State if there was a desire to do so and ready to be shipped in the channels of interstate; (2) The care and attention, for the purpose of packing or otherwise, which must be given to the goods situated in the State to enable the interstate commerce shipment to be made; (3) The receipt in the State from other States of the orders; (4) The clerical force or assistance which was required in the State to keep an account of the shipments as made to other States, and the supervision in Tennessee which was required to conduct the exclusive business of shipping into other States and of receiving the price resulting from such shipments."

This court rejected that contention (almost identical with the ATTORNEY GENERAL's claim here) and held the tax void, saying (p. 186):

> "* * * they were but the performance of acts accessory to and inhering in the right to make the interstate commerce shipments, and therefore to admit the power because of their existence to burden the right to ship in interstate commerce would necessarily be to recognize the authority to directly burden such right. In the nature of things, the protection against the imposition of direct burdens upon the right to do interstate commerce, as often pointed out by this court, is not a mere abstraction affording no real protection, but is practical and substantial and embraces those acts which are necessary to the complete enjoyment of the right protected. * * *
>
> "Some cases are pressed in argument as upholding the privilege tax in question under the circumstances here disclosed, but they are inapposite. We do not stop to review them in order to sustain this appreciation of the cases relied on, since, in our opinion in the nature of things, its accuracy is demonstrated by a mere statement of the proposition to which all the contentions here urged are in their essence reducible which is as follows: Although the shipment of merchandise from one State to another is interstate commerce, which the States cannot directly burden, nevertheless the States may directly burden such shipments in every case where there is any merchandise kept in the State to be the subject of interstate commerce shipment, or *when any of those steps which are essentially prerequisite to the initiation of an interstate commerce shipment are taken by the owner of the merchandise.*"

The mere ownership and storage of whiskey in bonded warehouses in Kentucky with such necessary care, attention, packing, etc., as may be necessary to enable the whiskey to be transported in bond from Kentucky to other States, cannot constitute the exercise of any privilege which the State can tax, when the tax is only levied upon the whiskey transported, in bond, from Kentucky to *other* States.

At the risk of repetition, it must be emphasized that *no tax* is imposed upon whiskey which is transported, in bond,

from one point in Kentucky to another point in Kentucky, nor so long as the whiskey remains in bond—in either of which instances the reasons of the ATTORNEY GENERAL apply equally as in the case of whiskey transferred, in bond, to a point outside the State. It is only taxed (1) when it is *removed* from bond, or, (2) on the point now being considered, when it is transported, under bond, in *interstate* commerce from Kentucky to some other point outside of the State.

The argument of the ATTORNEY GENERAL is precisely that which was *rejected* in *Heyman vs. Hays*, namely, that Kentucky may tax whiskey which is to be transported in bond to another State—

> "when any of those steps which are essentially prerequisite to the initiation of an interstate commerce shipment are taken by the owner of the merchandise" (236 U. S., 188).

The very essence of an *interstate commerce* shipment of the whiskey was that it should be "transferred under bond out of this State," and yet the act provides that the tax must be paid on each gallon "transferred under bond out of this State."

The ATTORNEY GENERAL contends that if the lower court is correct in holding the tax to be "really a *property*, and not an excise, *tax*" (R., 52), then it is at least free from the constitutional objection of being a burden upon interstate commerce, citing *Coe vs. Errol*, 116 U. S., 517, and *Diamond Match Co. vs. Ontonagon*, 188 U. S., 82, on the ground that the whiskey was manufactured in Kentucky and "was and is a part of the general mass of taxable property of the State"; and that—

> "the right of the State to tax it continues unimpaired until it starts on its ultimate journey in interstate commerce, or until it is delivered to and received by a common carrier for movement in interstate commerce" (Brief, p. 55).

In *Coe vs. Errol* and *Diamond Match Co. vs. Ontonagon*, logs which were cut in the taxing State were in each instance held in rivers, awaiting a convenient or profitable time for shipping them into other States for sale. They were taxed, upon the ground that, although *intended* to be sent out of the State, they had not yet *ceased* to be a part of the general mass of taxable property.

The difference between those cases and the case at bar is obvious, because in the latter the tax was *not* imposed on the whiskey *as* a part of the general mass of taxable property in Kentucky, but it actually remained untaxed *until*, and the tax was only imposed *when*, and on account of, its transfer out of the State.

As long as the whiskey remains in bond *in Kentucky*, it is *tax free*, but when it is transferred *out* of the State, *eo instanti* it is taxed, *because* of such transfer. That is a plain tax on interstate commerce.

That the act does not tax the whiskey itself, but only its transportation in interstate commerce, is emphasized by the ATTORNEY GENERAL, who said (Brief, p. 58):

> "We do not want the court to lose sight of the proposition that the law in question *does not tax* the whiskey produced in Kentucky or stored in Kentucky."

He contends that the tax is a mere license for the privilege of engaging in the business of owning and storing the whiskey in warehouses, and that (Brief, p. 59)—

> "the law does not tax the act of transferring whiskey in bond out of Kentucky, but it simply requires the payment of the license tax before the removal of the whiskey from the jurisdiction of the State."

A flat tax on property for the alleged privilege of owning it and keeping it in storage, as required by the internal-revenue laws, is obviously nothing but a *property* tax, and

is not a license or occupation tax. To say that a tax imposed upon each gallon of whiskey that *is* transferred out of the State

> "does not tax the act of *transferring* whiskey in bond out of Kentucky,"

but simply

> "requires the payment of the license tax *before* the removal of the whiskey from the jurisdiction of the State"

is a distinction without a difference.

You cannot tax whiskey only when it is transferred *out* of the State, and then, truly, say that such a tax is the mere payment of a license for the privilege of keeping it *in* the State!

The ATTORNEY GENERAL's contention amounts to this contradiction in reasoning:

The so-called license tax is for the privilege of owning and storing the whiskey *in* Kentucky, but as long as such privilege is exercised by owning and storing the whiskey *in* Kentucky, *no tax* need be paid or ever paid therefor; but the instant the whiskey is carried *out* of Kentucky—and *ipso facto* the alleged occupation of owning and storing it *in* Kentucky ceases—then, for the first time, the tax comes into being!

The ATTORNEY GENERAL relies on *American Mfg. Co. vs. St. Louis*, 250 U. S., 459, in which an ordinance was upheld which imposed, as a license tax for the privilege of conducting a manufacturing business in the city of St. Louis, a charge of one-tenth of 1 per cent of the sales of all goods manufactured in St. Louis, regardless of where sold, although the actual payment of the tax was postponed until the goods should be sold. Many of the goods were sold outside of Missouri. The basis of the decision was that the city

might charge, as a license tax on a manufacturing concern, a percentage of all goods there manufactured, whether sold or not; and the fact that the tax was limited to a percentage of the goods there manufactured and subsequently sold did not impose a burden on interstate commerce.

A license tax of a certain percentage on all whiskey manufactured in Kentucky, or manufactured in Kentucky and subsequently sold (whether in the State or outside of it), might be sustained under the *American Mfg. Co. Case;* but that is a very different thing from imposing a tax, not on the manufacturer, but upon the owner for every gallon which is transferred out of the State—so that the transfer out of the State, to wit, *interstate commerce*, is the very act which causes the tax to attach.

In the case at bar the tax was not imposed upon the property while at rest in Kentucky, nor even while it was in the process of being transported through Kentucky on its interstate journey (*Kelley vs. Rhoads*, 188 U. S., 1), but the tax only became effective *when* the interstate journey had actually been *completed* by the transfer of the whiskey across the State line.

The difference between the case at bar, on the one hand, and *Coe vs. Errol*, the *Diamond Match Co. Case*, and *American Mfg. Co. vs. St. Louis* is that in the three latter cases the tax was imposed, in two of them, as a property tax upon the logs *while still a part of the mass of taxable property*, and in the other instance the license tax was levied upon the goods manufactured under the license and subsequently sold (the fact that they were sold in part outside of the State being merely incidental), while in the case at bar it was solely the transportation in interstate commerce which brought the incidence of the tax into effect.

The invalidity of the tax may be illustrated by a case where the imposition of the tax was not so obviously upon the article shipped, as it is here.

In *United States vs. Hvoslef*, 237 U. S., 1, it was held that the war stamp tax upon charter-parties for the carriage of cargo from a State to a foreign port was invalid because in violation of the constitutional prohibition against laying any tax on articles exported from any State.

It was pointed out that the United States and the States were equally forbidden to tax exports, and that there was also a direct analogy to the commerce clause protecting inter-state commerce from State legislation imposing direct burdens.

The court said (p. 13):

> "The prohibition * * * is designed to give immunity from taxation to property that is in the actual course of such exportation (*Pace vs. Burgess*, 92 U. S., 372; *Turpin vs. Burgess*, 117 U. S., 504; *Cornell vs. Coyne*, 192 U. S., 418). This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid *specifically upon the goods themselves.*"

In the case at bar, however, the tax is laid *specifically upon the whiskey itself.*

The present contention of the ATTORNEY GENERAL, that the tax in question is not a tax upon articles transported in commerce, but is a mere tax on the occupation of owning and storing the whiskey to be measured by the amount transported in commerce, was aptly anticipated and answered by CHIEF JUSTICE MARSHALL in *Brown vs. Maryland*, 12 Wheat., 419, quoted in the *Hvoslef Case*, as follows (p. 14):

> "The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose, would the Government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it by say-

ing that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"

SECOND POINT.

The provision for imposing a tax on whiskey transferred, in bond, out of the State is an inseparable part of the Statute, and, being invalid, renders the entire Act void.

For the supposed privilege of "owning and storing whiskey" in Kentucky, the Act imposes two classes of taxes:

(*a*) Fifty cents a gallon on the whiskey which is tax-paid and removed from bond and becomes a part of the mass of taxable property in Kentucky; and

(*b*) Fifty cents a gallon on the whiskey transported in bond *out* of the State.

The latter being, as we have seen, invalid, can it be presumed that the Legislature would have imposed 50 cents a gallon privilege tax on the whiskey, which, being removed from bond, became available for use in the State, when at the same time whiskey (enjoying the same privilege of being owned and stored) which is shipped, in bond, out of the State is *exempted* from such tax? Is it conceivable that the Legislature would have been willing to pass the statute taxing the one without the other?

As the Act attempted to reach all the whiskey in bond in Kentucky, will not the entire Act fall when a large portion of the whiskey sought to be taxed will entirely escape taxation through the invalidity of that portion of the law? The rule is thus aptly stated in 6 R. C. L., §122:

> "The question as to whether portions of a statute which are constitutional shall be upheld, while other divisible portions are eliminated as unconstitutional is primarily one of intention.

"If the objectionable parts of a statute are severable from the rest in such a way that the Legislature would be presumed to have enacted the valid portion without the invalid, the failure of the latter will not necessarily render the entire statute invalid, but the statute may be enforced as to those portions of it which are constitutional.

"If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the Legislature would not have passed the residue independently, and accordingly the entire statute is invalid.

"This is simply another way of stating the familiar rule, that if the parts of a law are divisible, and some of them are constitutional and others not, the constitutional provisions cannot be held valid if it appears that they would not have been adopted without the other parts."

The Legislature of Kentucky cannot be presumed to have intended to pass a discriminatory tax which would operate *against* the whiskey remaining *in* the State and *in favor of* the whiskey shipped *out* of the State.

In *State vs. O'Connor,* 5 N. D., 629, an Act of North Dakota attempted to tax all persons engaged in the business of offering merchandise for sale. It was held that, so far as the act attempted to tax persons engaged in the business of selling, by sample, in North Dakota, goods to be shipped into North Dakota from another State to fill the orders so obtained, it was void, as an unlawful interference with interstate commerce, under the authority of *Brennan vs. Titusville,* 153 U. S., 289, and others.

In holding that the failure of the act to stand as to such persons, necessarily caused it to fail entirely, on the ground that the legislature could not have intended to discriminate

against local business enterprises in favor of foreign enterprises, the court said:

> "When the Legislature have declared in the most emphatic manner that these persons shall be included in the law, and that it is on that condition that the act is passed, it would be equivalent to creating a new statute by judicial decision for us to hold that it would nevertheless stand as to its other provisions after it had been adjudged void as to such persons,—a new statute, discriminating against the business interests of the State."

This court announced the same principle in *Pollock vs. Farmers Loan & Trust Co.*, 158 U. S., 601, 635, where CHIEF JUSTICE FULLER said:

> "Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole.
>
> "It is elementary that the same statute may be in part constitutional and in part unconstitutional, and, if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and, as to them, we think the rule laid down by Chief Justice Shaw in *Warren vs. Charlestown*, 2 Gray, 84, is applicable, that 'if the different parts are so *mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that if all could not be carried into effect the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them,*' or, as the point is put by Mr.

Justice Matthews in *Poindexter vs. Greenhow,* 114 U. S., 270, 304: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced, as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing, by itself, to enact.' And again, as stated by the same eminent judge in *Spraigue vs. Thomson,* 118 U. S., 90, 95, where is was urged that certain legal exceptions in a section of a statute might be disregarded, but that the rest could stand: 'The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what, confessedly, the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted, in view of the illegality of the exceptions.'"

Without enlarging further on this proposition, it is submitted that the provisions of this Act are not separable, so as to permit the tax to stand (if it be considered as a license tax), so far as the occupation of removing whiskey from a warehouse for sale *in* Kentucky is concerned, while at the same time, holding invalid that part relating to the removal of the whiskey *out* of the State.

THIRD POINT.

The act is unconstitutional because it is, in fact, a property tax, and, as such, it is in violation of the Kentucky constitution, §171.

The Kentucky Constitution, §171, as amended in 1915, provides as follows:

> "The General Assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only *and shall be uniform upon all property* of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.
>
> "The General Assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation."

Pursuant thereto, the General Assembly provided for an annual tax of 40 cents upon each $100 in value of all property directed to be assessed (Ky. Stat., §4019, as amended March 5, 1918).

1. The Act under consideration, while literally providing for an "*annual* license tax," must be construed (in order to have any chance of constitutionality) as requiring *not* an "annual" tax, but as requiring only one tax, once and for all, upon each gallon of whiskey (see Brief of Attorney General, p. 37-39). But that very concession destroys its constitutionality as a property tax under §171, which requires that it shall be "annual."

Therefore it cannot be justified, under Constitution, §171, which mandatorily provides for an "annual" tax.

2. It is void for another reason. Section 171 requires that all taxes levied thereunder "shall be uniform upon all property of the same class." The Legislature has never classified whiskey as a separate class; and therefore the tax upon whiskey must be the same as upon other property.

The Act now in question, however, imposes a tax of 50 cents a gallon, while all other property is taxed 40 cents on the $100. For that additional reason this 50 cents a gallon whiskey tax cannot be sustained as the exercise of power under §171.

3. Whiskey is already subject to an annual tax of 40 cents per $100 of value (R., 73), and it is therefore obvious that an additional specific tax of 50 cents a gallon cannot be imposed consistently with §171 (*Campbell County vs. City of Newport*, 174 Ky., 712, 723) when no similar tax is imposed on any other class of property.

In *Campbell County vs. City of Newport*, 174 Ky. 712, 723, it is said:

> "Taxation that is not uniform is necessarily unequal and amounts to double taxation, whether the lack of uniformity or the appearance of duplication is exhibited in the exemption of some property from the tax or in taxing twice for the same purpose a part of the property subject to the tax. Double taxation and lack of uniformity are each alike vicious and unjust and opposed to the principles of equality and fairness upon which the merit of our whole scheme of taxation depends.
>
> "In the present constitution there is a declaration that taxation must be uniform, but no direct prohibition against double taxation. But a prohibition against double taxation was hardly necessary, *because there cannot be such a thing as double taxation where the taxation is uniform*. Double taxation means taxing twice, for the same purpose, in the same year, some of the property in the territory in which the tax is laid without taxing all of it. If all the property in the territory upon which the tax is imposed

is taxed twice and for the same purpose and in the same year without discrimination or exemption, this is not double taxation in the sense that such taxation is prohibited, because, within constitutional limits, if the tax is uniform, the amount of it is in the discretion of the taxing authorities, and it may be levied at one time or it may be the subject of several levies. *Uniformity in taxation and double taxation are wholly inconsistent.* One cannot exist where the other is in force. And so if our constitutional scheme of uniform taxation is observed, there can be no double taxation. Cooley on Taxation, vol. 1, p. 394.

"In this connection it is worthy of notice that while there was no command in our former constitutions that taxation should be uniform or prohibition against double taxation, these principles had become so deeply imbedded in the fundamentals of the law that the courts of this State, before the adoption of the present constitution, as well as since, have consistently held that *taxation* that lacked uniformity, or *that was open to the objection that it was double taxation, was so obnoxious that it could not be sustained.*"

In *Raydure vs. Board of Supervisors,* 183 Ky., 84, 96, the court thus explained §171 as amended:

"Previous to the amendment of section 171 of the Constitution by the amendment that was adopted in November, 1915, section 171 provided in part that 'taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general law.'

"Under this original section it was held, in *Levi vs. City of Louisville,* 97 Ky., 394, that the Legislature had no power to substitute a license tax or any other kind of a tax in lieu of the uniform *ad valorem* property tax or to classify property for taxation.

"To escape the effect of this decision section 171 of the Constitution was amended as stated. By the amendment there was inserted in the original section

after the words 'they shall be uniform upon all property' the words 'of the same class;' and there was added to the section these words: 'The General Assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation.' It will thus be seen that the only change made by the amendment in the original section that is pertinent to the matter now being considered was that permitting the classification of property and the right to determine what classes should be subject to local taxation. It is further obvious that *until* a classification of property has been made *a uniform tax must be imposed upon all the property* subject to taxation within the territorial limits of the authority levying the tax, but if the property within the territorial limits has been divided, as it may be, into classes, then a different tax may be imposed upon the property in each class, but it, too, must be uniform upon the property in that class. There can be no lack of uniformity or discrimination in the imposition of taxes upon property in the same class, and *when there has been no classification the strict rule of uniformity obtains now as it did before the amendment.*

"It was held, as we have seen in the Levi case, that the Legislature was prohibited by section 171 of the Constitution from substituting a license tax for an *ad valorem* tax, and this prohibition was continued by authority of the amendment, property is classified, allowable under the amendment to substitute a license tax for an *ad valorem* tax than it was before the amendment. The only character of taxes that can be imposed under section 171, either before or since the amendment, is *ad valorem* or property taxes. If, by authority of the amendment, property is classified, as it may be, for taxation, the tax that is imposed on the class under this section must be an *ad valorem* or a property tax. Neither the rule of uniformity nor the nature of the tax was changed in any manner by the amendment. The only change was the authority to classify, but when the classification is made the tax imposed must be an *ad valorem* or property tax and must be a uniform tax."

This discussion need not be prolonged. It was expressly conceded below that this tax could not be sustained as a property tax under §171. (See Opinion, R., 70.)

The same concession seems to be made by the ATTORNEY GENERAL here (Brief, pp. 47-50), where he contends that the Act is not in violation of §171 because

> "This is *not a property tax*, but purely an occupational tax or an excise tax" (under §181).

Having thus demonstrated that the tax, if it is a property tax, is void under section 171, it only remains to consider the question whether this is, or is not, a property tax.

The three judges below, DENISON, EVANS, and COCHRAN, JJ., held that it was a property tax in the clothes of an excise tax (R., 52, 74).

This is not a tax upon each gallon manufactured, which would then be an excise tax, but it is a tax on every gallon *owned* by any one. It is as specifically a property tax as could possibly be imagined. It was designed to reach every gallon of whiskey in Kentucky, because sooner or later every gallon would be forced out of bond by the United States internal revenue laws, if it had not been previously transported under bond out of the State.

FOURTH POINT.

The Act is unconstitutional because it is not such a license tax, special or excise tax, as is authorized by the Kentucky Constitution, §181.

The Kentucky Constitution, §181 (as amended in 1903), provides, so far as is relevant here, as follows:

> "The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax."

The Act of March 12, 1920, provides that every person (R., 14)

> "Engaged in the business of manufacturing distilled spirits,"

and every person

> "engaged in the business of owning and storing such spirits in bonded warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose"

shall pay the 50 cents a gallon license tax on the spirits "so manufactured or stored," etc.

That language is reasonably susceptible of two interpretations, but in either event the law is void as to the Kentucky Co. with respect to the whisky here involved.

A. If it means that the license tax is imposed on every person "engaged in the business of"

> "manufacturing distilled spirits * * * *and* * * * owning and storing such spirits."

i. e., as the ATTORNEY GENERAL contends (Brief, p. 39) that it was the Legislature's purpose to tax

> "one continuous business *beginning* with the distiller;" and "this *entire business of distilling*, owning and storing and removing from bonded warehouses should bear only the one tax as an occupational tax,"

then, obviously, the tax cannot apply to the whiskey here involved, because the Kentucky Co. is not, and has not been, *since the Act was passed*, engaged in *manufacturing* the distilled spirits so owned, stored, and removed. All the whiskey was manufactured more than five years before the Act was passed (R., 4, 6, 76, 77).

Therefore, on that interpretation of the Act, it is inapplicable, because one essential element of the occupation taxed is absent, *i. e.*, the *manufacturing* of the whiskey.

A license tax on the *manufacturing, owning, storing* and removing *of* whiskey ("as one continuous business") can not apply to a person who is not engaged in "manufacturing," but only in "owning, storing and removing" whiskey.

A license tax on the manufacture and owning of tobacco would not apply to a cigar store, which while "owning" tobacco, did not "manufacture" it.

The present tax applies to the owner of a warehouse receipt, who purchased it yesterday, and desires today to remove the whiskey, in bond, to Ohio. He certainly has never been engaged in "manufacturing" the whiskey, which was not manufactured by any one since the Act was passed.

On that interpretation, the Act does not apply to this whiskey, but only to whiskey manufactured *after* the Act was passed; but whether, so construed, it is valid as to future whiskey, is a question not presented on this record (see Opinion below, R., 76–77).

The ATTORNEY GENERAL suggests (Brief, p. 40) that as the act *of* manufacturing whiskey might have been subject to a license *or* excise tax at the time *of* the distillation (five years ago) the mere fact that the Act is retroactive in its effect, is no objection to its validity.

We respond:

(*a*) The Act is not retroactive in its terms, which are apparently prospective only.

(*b*) No Act imposing liability is to be construed retroactively, unless the language plainly so requires.

(*c*) The tax is not levied on the person who *engaged* in the occupation of manufacture, but on the person who now happens to *own* the warehouse receipt, purchased perhaps yesterday. The distiller who alone engaged in the business of making whiskey, escapes the tax entirely.

In conclusion, it is submitted that if the Act, properly interpreted, is a license tax on the making of whiskey *plus* other activities (storage and removal), then it is inapplicable to whiskey made *before* its passage, or to the present owners

thereof, because one essential element in the occupation taxed is absent, *i. e.*, the *act of* manufacture.

B. If, however, the Act means that it imposes a tax on the mere act *of* owning, storing and removing whiskey from bond (as the ATTORNEY GENERAL contends is an admissible interpretation, Brief, p. 42), then we submit it is not a license *or* excise tax at all, but a mere property tax, which, as we have seen, is void under the Kentucky Constitution, §171 (p. —, *supra*).

The tax is clearly *not* imposed on the business of storing whiskey, in which event the tax would be levied on the operators *of* the storage warehouse, either in a flat sum, or in an annual sum, or on a sliding scale according to the amount stored, time stored, *etc.*

It is imposed upon the *act of ownership;* that is to say, not upon the act of storing for hire *or* gratuitously, *for* some one else, but upon the act of owning, storing (in the sense of keeping it safely), and removing it from bond, *i. e.*, in assuming physical possession of the thing owned. The lower Court aptly expressed this idea in its opinion (R., 74):

> "* * * out of several successive owners of warehouse receipts, who would thus engage in the storing business, all but the last one go free; the thing really taxed is the act of the owner in taking his property out *of* storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.*, consumption, sale or keeping it for future consumption or sale.
>
> "We cannot escape the conviction that it was the real purpose of those who drafted this law to levy a substantial tax upon this great body *of* property, as property, and that the form of an occupation or excise tax was adopted in order that an object might be accomplished which the Kentucky Constitution forbade. *It is a property tax in the clothes of an excise.* The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value."

In *Pollock v. Farmers Loan & Trust Co.*, 157 U. S., 429, 158 U. S., 601, as interpreted in *Knowlton v. Moore*, 178 U. S., 41, 81, and as further approved in *Flint v. Stone Tracy Co.*, 220 U. S., 107, 148-150, it was held (the court's italics),

> "* * * that a tax which was in itself direct, *because imposed upon property solely by reason of its ownership*, could not be changed by affixing to it the qualifications of excise or duty. * * *
>
> "Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons *solely because of their general ownership of property* from being levied by any other rule than that of apportionment, two questions were decided by the court:
>
> "First, that no sound distinction existed between taxes levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property."

In *Flint v. Stone Tracy Co.* it is said (p. 150):

> "The *Pollock Case* construed the tax there levied as direct, *because it was imposed upon property simply because of its ownership.*"

In *Zonne v. Minneapolis Syndicate*, 220 U. S., 187, it was held that the Corporation Tax Law of 1909, which carried the doctrine of excise taxes to the extreme limit, could not reach a corporation which simply held title to a parcel of real estate and received and distributed the rental therefrom to its stockholders. The point of the decision was that the mere ownership of property, with the collection of the income therefrom and the distribution thereof to those beneficially entitled thereto, did not show the exercise of any occupation, privilege, or doing of business in a corporate capacity.

This was extended in *McCoach v. Minehill Railway Co.*, 228 U. S., 295, so as to hold that a railway company which leased its property for a long term of years and maintained

its corporate organization, collected rents, revenues, dividends and interest, declared dividends, managed its finances, invested its funds, paid taxes, preserved its corporate franchises, etc., was not doing business so as to be subject to the corporation excise tax. The opinion (p. 301) refers to the interpretations put upon the *Pollock Case* in subsequent decisions and emphasizes the fact that an excise tax could not be imposed upon property "solely because of its ownership," and the fact that a railway company *might* have exercised its power of eminent domain and other powers (but had not done so) would not make the tax applicable to it.

So here, the fact that the owners of the whiskey might in the future sell it or do something with it which would subject them to an excise tax is immaterial. The point is that the present tax is imposed solely because of the ownership of the whiskey. This is illustrated by the fact that the owner of the whiskey who buys a warehouse receipt on one day and removes the whiskey, in bond, to Ohio on the same day, is subjected to the tax, while all prior owners of the same identical whiskey, whose ownership may have extended over five years, are *free* of the tax. This shows that the tax is imposed, not because of any *occupation*, but merely because of the *ownership* of the property at the time it is transported in interstate commerce from Kentucky to Ohio. (See also *United States v. Emery*, 237 U. S., 28.)

As pointed out in the opinion below (R., 76), this Court in the *Zonne*, *Minehill* and *Emery* cases was trying to find the legislative intent in using the phrase "doing business," while we are concerned with the power of the Kentucky Legislature to impose an *excise* tax; but the power to impose an excise tax rests, at last, upon whether the person against whom the tax is assessed is "engaged in business," and thus the two questions come to be the same.

It is entirely possible that an excise tax can be constitutionally imposed upon the business of storing whiskey for

aging purposes, in which event it would be treated as a branch of the manufacturing business. But the act under consideration did not purport to do any such thing. The tax was not imposed upon the business of storing whiskey, whether it be looked at from the standpoint of the person operating the warehouse (in which others would store whiskey), or from the standpoint of the owner who stored his own whiskey, in order that it might become more palatable as an object of commerce. The tax here is the same whether the storage has been for one day or for five years; it draws no distinction between the warehouseman and the owner; it is only interested with the question of the *ownership* (regardless of the storage) at the particular moment when the whiskey is tax paid and removed from the warehouse or transferred under bond in interstate commerce from Kentucky to some other State. It is, therefore, plainly a tax upon the *ownership* of the whiskey and not in any sense a tax on the *business of storing* whiskey.

FIFTH POINT.

The Kentucky Co. properly resorted to equity, as there is no adequate remedy at law.

The ATTORNEY GENERAL contends that the Kentucky Co. had an adequate remedy at law under Ky. Stat., Sec. 162, as follows:

> "When it shall appear to the Auditor, that money has been paid into the treasury for taxes, when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same."

and that the Kentucky Co. should, first, have paid the $800,000 of taxes (now due) and sued the Auditor to issue a warrant for repayment.

Waiving the point that at the time the bill was filed and

the decree entered the law of Kentucky as then declared by its Court of Appeals did not authorize a taxpayer to recover at law (see opinion below, R., 63, 64), and that only since this case was advanced on the docket here has the Court of Appeals overruled its prior decisions and held (*Craig vs. Security Prod. & Refining Co.*, 189 Ky., 565, 568, decided November 16, 1920) that a taxpayer may mandamus the Auditor to issue his warrant for taxes illegally collected, we submit that no adequate remedy existed at law, and that only equity could give proper relief.

I. Although §162 has been in force for 75 years, it is the settled law in Kentucky that an injunction to prevent the collection of a void tax under an unconstitutional statute is the proper procedure, *because the remedy at law is not adequate* (*Gates vs. Barrett*, 79 Ky., 295; *Negley vs. Henderson Bridge Co.*, 107 Ky., 414; *Mt. Sterling Oil & Gas Co. vs. Ratliff*, 127 Ky., 1). This was recognized in *Bank of Kentucky vs. Stone*, 88 Fed., 383 (affirmed by a divided court, 174 U. S., 799), which was a suit to enjoin the collection of a tax in Kentucky where (notwithstanding §162) it was held that an injunction would lie, the Court (HARLAN, TAFT, and LURTON, JJ.), saying (p. 391):

> "The practice of the State courts of Kentucky in issuing injunctions against the collection of taxes cannot, of course, be a controlling consideration in determining the limits of the equity jurisdiction in the Federal courts in such cases; for it is settled that if a case, 'in its essence, be one cognizable in equity, the plaintiff (the required value being in dispute) may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction.' *Smyth vs. Ames*, 169 U. S., 466, 516.
>
> "*But it is worthy of note that the Court of Appeals of Kentucky has held that, in the absence of a statute allowing an action to recover back from the State*

taxes illegally collected, the remedy by injunction is the only adequate one."

2. There are many reasons why there is no adequate remedy at law in the case at bar.

(*a*) *Multiplicity of Suits.*—As withdrawals from bond and shipments out of the State are taking place daily (R., 7), and the payment of the taxes must be made *monthly* (R., 15), it would be necessary for the Kentucky Company, or the owners of the whiskey, to bring a separate suit each month; not only would suit have to be brought each month, but there might be a *great many suits* brought each month by the *different owners* of the whiskey who were compelled to pay the tax.

Within less than a year the taxes against the Kentucky Company alone amounted to more than $800,000, so that separate suits for very large sums would necessarily be brought each month.

(*b*) *Loss of Interest.*—Ky. Stat., §162, contains no provision for the repayment of interest. The Auditor is only authorized to issue his warrant for the face amount of the taxes paid. Therefore, with respect to the 30,000,000 gallons of whiskey in Kentucky on March 12, 1920, there will ultimately be something like $15,000,000 of taxes paid to the State, of which the Kentucky Co.'s whiskey will bear a large portion. Even if successful in getting warrants from time to time from the Auditor, that would not mean the collection of the money, as will be presently seen. During the period of the litigation at law necessary to get the warrants, the taxpayer would lose the use of his money and could not recover any interest therefor. This circumstance alone shows that the remedy at law is not adequate, and that equity had to be resorted to in order to give complete relief to the taxpayer from an unconstitutional statute.

(c) ***Treasurer Not Bound by Auditor's Action.***—If the action at law by mandamus were successful and the Auditor compelled to issue a warrant, still the Treasurer is not bound to honor the warrant. Even after it is issued by the Auditor the Treasurer may again raise the question of the validity of the warrant and of the Auditor's action in issuing it (*Rhea, Treasurer, vs. Newman*, 153 Ky., 604, 607-609). This shows that the taxpayer might have to embark in a *second litigation* to compel the Treasurer to recognize the validity of the Auditor's warrant.

(d) *Prior Appropriation Essential.*—Ky. Stat., §143, provides as follows:

> "A warrant of the Auditor upon the Treasurer shall state upon its face the date, amount, the name of the person to whom payable and on what account, and out of what found to be paid; *and shall not be issued unless the money to pay the same has been appropriated by law;* and he may require any claimant to state on the face of his claim *the law under which it is payable.*"

Until, therefore, the Legislature has appropriated the money to pay the tax illegally collected under this unconstitutional law, even the Auditor cannot be required to issue the warrant; and, even if he does, *a fortiori* the Treasurer could refuse to pay it on the ground that there had been *no appropriation* made by the Legislature for its payment. It is hardly likely that the Legislature would make an appropriation necessary for the refund of taxes collected under one of its own laws until after litigation had established the invalidity of its prior act.

(e) *Delay in Payment by Treasurer.*—The Treasurer is only required to redeem the Auditor's warrants "if there be sufficient money in the treasury appropriated for that purpose" (Ky. Stat., §4688*a*-1); and whenever "the funds ap-

propriated for the purpose for which said warrant was issued are exhausted, the Treasurer shall endorse thereon the date of its presentation with the words " 'No funds with which to pay this warrant, and it bears 5 per cent interest from this date until called in' " (Ky. Stat. §4688*a*-2); and whenever the Treasurer has as much as $50,000 available for the redemption of warrants, he is required to redeem them in the order of serial number (Ky. Stat., §4688*a*-4).

It is thus seen that even assuming that a taxpayer has successfully run the gauntlet of one or more actions at law until he shall have secured an Auditor's warrant for the amount of his single monthly tax payment, still he only gets 5 per cent interest thereon (instead of the 6 per cent regular rate) and must await his turn until there is sufficient money to redeem the warrant.

As there were in 1912 more than $2,000,000 of outstanding warrants against Kentucky (153 Ky., 606), which have since been increased to between $4,000,000 and $5,000,000, it will be seen that the prospect of the holder of a State warrant securing prompt redemption thereof is dubious, to say the least.

(*f*) *Warrants if Issued Probably Void.*—Up to this point we have tacitly assumed that warrants issued under Ky. Stat. 162, as urged by the ATTORNEY GENERAL, would be valid and ultimately paid to the taxpayer. In view, however, of the enormous sums involved under this "50 cent a gallon tax Act" which, if collected, spent, and then ordered refunded, would amount to millions of dollars, it is proper to note Ky. Constitution, §49, which provides as follows:

> "The General Assembly may contract debts to meet casual deficits or failures in the revenue; *but such debts direct or contingent, singly or in the aggregate, shall not at any time exceed $500,000*, and the moneys arising from loans creating such debts shall be applied only to the purpose or purposes for which they were obtained, or to repay such debts."

By §50 the General Assembly is forbidden to create any debt above the $500,000 except by a vote of the people.

In *Stanley vs. Townsend*, 179 Ky., 833, the court held unconstitutional a large part of the Act of 1916 (Ky. Stat. 4688*a* above mentioned), and it would seem that the balance thereof was equally unconstitutional, although possibly not directly involved in that decision. The court pointed out that the Legislature could not provide for the payment of warrants issued by the Auditor (if the State's debt exceeded $500,000) except by a vote of the people.

(*g*) *The Tax Illegally Collected Goes to the Counties Rather Than to the State.*—A final reason why there is no adequate remedy at law, is, that by §6 of the Act in question, 65 per cent of the taxes collected must go to the State Road Fund (R., 16). The State Road Fund is apportioned among the several counties (Ky. Stat. §4356*x*, as amended; see 2 Ky. Stat. (1915 Ed.), §4356*x* and 3 Ky. Stat. (1918 Ed.) §4356*x*-1).

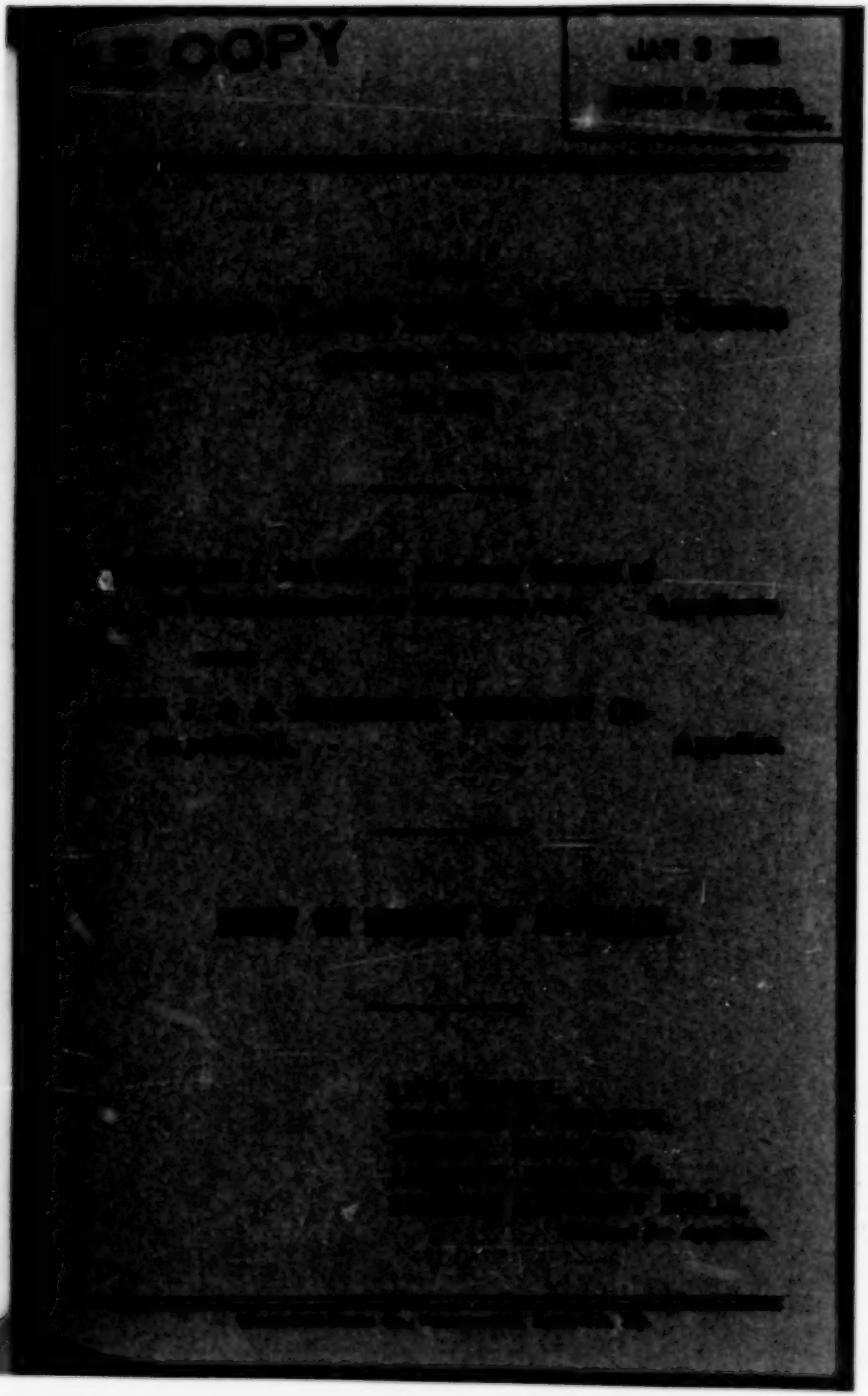
Mitchell vs. Knox County Fiscal Court, 165 Ky., 543, shows how the money of the State Road Fund becomes the individual property of the several counties.

If the taxes under the Act in question should be paid by the taxpayers into the State treasury, 65 per cent thereof would soon be apportioned to the various counties in the State. The course which a taxpayer would have to follow at law in order to recover the taxes thus illegally collected from him would be a long and devious one, indeed.

3. From the foregoing review it can be readily seen that the taxpayer's remedy *is not adequate at law.* Therefore, the Kentucky Co. was compelled to resort to equity in order to test the validity of this Act.

LEVY MAYER,
WM. MARSHALL BULLITT,
Counsel for Appellee.

JANUARY 3, 1920.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POINTS AND AUTHORITIES.

I.

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1. Jurisdiction is founded upon:

(1) Diversity of the citizenship of appellants and appellee and the amount in controversy, which, exclusive of interest and costs, exceeds three thousand dollars 3

Judicial Code, Section 24, Subsections 1 and 14 (4 F. S. A. 839-840).
Judicial Code, Section 52 (5 F. S. A. 519).

(2) Because of the questions arising under the Constitution of the United States 3

Greene, Auditor, et al., v. Louisville & Interurban R'y Co., 244 U. S. 499.
L. & N. v. Bosworth, 209 Fed. 380; s. c. 230 Fed. 199; s. c. 244 U. S. 522.

2. Statement wherein is considered prior and existing laws of Kentucky and the condition in which appellee was placed 4

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ALPHABETICAL LIST OF CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 582.

CHARLES L. DAWSON, Attorney General of the Commonwealth of Kentucky, and individually,

LOUISVILLE PUBLIC WAREHOUSE COMPANY, (a corporation),

JOHN J. CRAIG, Auditor of the Commonwealth of Kentucky, and individually, *Appellants*,

v.

THE J. & A. FREIBERG COMPANY (incorporated), - - - - - - - *Appellee*.

BRIEF FOR APPELLEE.

This suit involves the constitutionality of an Act of the Kentucky Legislature, approved March 12, 1920 (known as the Vance Act), imposing a so-called "annual license" tax at the rate of fifty cents per gallon upon the business of owning and tax paying or transferring under bond distilled spirits from United States bonded warehouses in Kentucky. The Act is printed in full in the appendix hereof, p. 89, and also in the Record, p. 7, and in appellant's brief, p. 63.

Acting under Section 266 of the Judicial Code, and after elaborate preparation on the merits through affidavits and testimony taken before a Commissioner appointed for the purpose, the Honorable C. A. Denison, Circuit Judge, and the Honorable Walter Evans and Honorable J. E. Sater, District Judges, on May 31, 1920, granted a preliminary injunction restraining the collection of such tax, Record, p. 153, and delivered an able and exhaustive opinion, found in the Record, p. 126, and thereafter, on June 17, 1920, the same conclusion was reached in the case heard herewith of the same appellants against the Kentucky Distilleries & Warehouse Company, in the Eastern District of Kentucky, except that the Honorable A. M. J. Cochran, District Judge, sat in the place of the Honorable J. E. Sater, District Judge.

Appealing from the above mentioned preliminary injunction the appellants bring the record here for review.

I.

JURISDICTION.

The jurisdiction is founded upon:

(1) The diversity of citizenship of the appellants and appellee, the amount in controversy, exclusive of interest and cost, exceeding three thousand dollars; Judicial Code, Section 24, Sub-sections 1 and 14 (4 F. S. A. 839-840); and the residence of the Louisville Public Warehouse Company, one of the appellants in the Western District of Kentucky; Judicial Code, Section 52 (5 F. S. A. 518).

(2) Because of the question arising under the Constitution of the United States; Greene, Auditor, *et al.*, v. Louisville & Interurban R'y Co., 244 U. S. 499; L. & N. v. Bosworth, 200 Fed. 380; s. c., 230 Fed. 199; s. c., 244 U. S. 522.

Appellants urgently insist that there is no jurisdiction in equity because there is claimed to be an adequate remedy at law, and that the proceedings herein should be stayed under Judicial Code, Section 266, pending a final decision in a case in the state courts, and they avoid, so far as possible, a discussion of the merits in chief, but we believe that the jurisdiction of equity is clear and that the claim for a stay is fallacious, and that both of these questions may best be considered after the nature of the case is developed, and, therefore, will discuss them respectively under the next to the last and the last points in this brief.

STATEMENT.

The appellee, a citizen of Ohio who does no business in Kentucky, brought this suit in the District Court of the United States for the Western District of Kentucky, against the appellants as citizens of Kentucky, to enjoin them from withholding the property of the appellee valued at more than $8,000.00. This property was represented by the ownership of negotiable warehouse receipts for 204 barrels, containing 9804.62 proof gallons, of whisky held in the United States general bonded warehouse of the defendant, Louisville Public Warehouse Company, at Louisville, Kentucky, and which whisky appellee desired to have transferred, not as a privilege or occupation but pursuant to the laws of the United States (U. S. Compiled Statutes, Section 6062), *under bond* to a United States general bonded warehouse in Boston, Massachusetts.

The appellant, Louisville Public Warehouse Company, conducts a United States general bonded warehouse, and claiming to be a designated collecting officer for the State of Kentucky declined to permit such removal, unless in addition to the payment of all other charges and taxes the appellee would pay the tax of fifty cents per gallon hereafter discussed, because its co-appellants, who are, respectively, the Attorney General of Kentucky who is charged with the duty of enforcing its law (Ky. Stats., Sections 111 to 115), and the Auditor of Public Accounts of Ken-

tucky, who is the chief fiscal officer of the Commonwealth and charged with the duty of receiving reports and payment required by the Act in controversy, were asserting its liability to the State of Kentucky for such tax and for the lien and heavy penalties attaching for a failure to pay such tax.

The Constitution of Kentucky, as to *ad valorem* taxes, provides in Section 171 that taxes "shall be uniform upon all property of the same class subject to taxation," and by Section 172 that "all property shall be assessed for taxation at its fair cash value estimated at the price it would bring at a voluntary sale."

Whisky in bond is valued by the State Tax Commission, sworn to assess it at its fair cash value, for *ad valorem* taxes and for the year in question appraised all the whisky stored in bonded warehouses in Kentucky at $25 per barrel (or fifty cents per gallon), and on that basis the owners of warehouse receipts on whisky in bond are compelled to pay state, county, city, school and road tax rates levied by the jurisdiction in which the property is situate. City of Louisville v. Louisville Public Warehouse Company, 107 Ky. 184; Commonwealth v. E. H. Taylor, Jr. Company, 101 Ky. 325; Jett Bros. Distillery v. City of Carrollton, 178 Ky. 561; Thompson v. Commonwealth, 123 Ky. 302; s. c. 209 U. S. 340.

The appellants admit and concede that the tax in question would be void if an *ad valorem* tax upon the property itself.

The Kentucky Constitution by Section 181a provides:

> "The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax * * *."

Under this provision various license laws have been enacted in Kentucky, not for police regulation, but solely as revenue measures. Raydure v. Board of Supervisors, 183 Ky. 84; Greene, Auditor v. Taylor, Jr. & Sons, 184 Ky. 739.

Acting under Section 181a the Kentucky Legislature, by an Act of March 26, 1906 (Kentucky Statutes, Section 4114a), imposed upon those "engaged in the business of blending" or "rectifying"

> "a license tax of one and one-fourth cents upon every wine gallon of such compounded, rectified, blended or adulterated distilled spirits."

In a general revision of the tax system of Kentucky the Kentucky Legislature, on May 2, 1917 (Kentucky Statutes, Section 4214a-1), adopted a license tax at the rate of two cents per proof gallon upon those who

> "engage in the business or occupation of manufacturing distilled spirits known as whisky or brandy, or other species of such double stamp spirits in this state * * *."

And apportioned the tax collected therefrom to the State road fund 20% thereof and to the school fund

30% thereof and 50% thereof to the general expenditure fund of the State, and further provided that for a failure to pay the tax within fifteen days after it became due, a penalty of 8% on the amount of the license should attach "and the Auditor shall at once cause such proceedings to be instituted for the collection of such tax" by suit.

That Act was construed by the Kentucky Court of Appeals in Greene, Auditor v. Taylor, Jr. & Sons, 184 Ky. 739-743, and was described as being "simply and purely a license tax" and

> "it is not a tax upon the property nor its value but is a tax regulated as to its amount by the volume of business done by the corporation *for the privilege of engaging in the business of manufacturing double stamp spirits.*" (Our italics.)

The wartime prohibition act of Congress and the promulgation of the Eighteenth Amendment to the Constitution of the United States stopped all manufacture of distilled spirits in Kentucky, with an accompanying loss of state revenue. However, it appeared to the Kentucky Legislature of 1920 that 30,000,000 gallons (out of the 70,000,000 gallons in the United States) of such whisky was stored in United States bonded warehouses in Kentucky but being very rapidly withdrawn and sent to other countries and other states. Thereupon the Legislature of Kentucky passed, March 12, 1920, the law now in controversy, and which was approved the same day.

This Act in its main features follows closely the Act of May 2, 1917, last mentioned, but the present law is made applicable not only to the *manufacture in futuro* of such distilled spirits (as might be manufactured under special permit under the Act of Congress known as the Volstead law), but is also extended by Section 1 to include an

> "annual license tax upon" every one "engaged in the business of owning and storing" distilled spirits "in bonded warehouses in this state, and in removing same therefrom * * * for any purpose" or that may be from such bonded warehouses "transferred therefrom under bond out of the Commonwealth of Kentucky * * *" "of fifty cents on each proof gallon."

The Commonwealth is forced to concede that if the tax be annual it would be confiscatory, but it may be here noted that the tax levied is not only an increase of 2500% upon the *static condition of exercising the property right* of withdrawing the whisky from bond or removal under bond, as compared with the tax levied upon the occupation of manufacturing distilled spirits in the former Act, but is equal to 100% of the valuation of the commodity as fixed by the State Tax Commission for *ad valorem* value for the current year, and is under the proof in the case a tax of from forty to fifty per cent of the value of the whisky in bond represented by warehouse receipts, which have by the course of business for many years been traded in upon a margin of profit or loss

represented by but a few cents per gallon, with the net result that not simply is the possibility of profit wiped out, but from thirty-five to forty per cent of the capital invested in the occupation is forthwith seized, or, as has been said, "expropriated."

It is further to be noted that this license is payable only by the last owner of the warehouse receipts when and if he endeavors to exercise his right of ownership by withdrawing from bond or transferring under bond his whisky from a general bonded warehouse in Kentucky, whether he has been the owner for one minute or for ten years, and the numerous intervening owners of the negotiable warehouse receipt, which may be traded in, under Section 3, Article 2 of the Volstead Act, wholly escape any license or occupation tax on their ownership and storage, because the owners of receipts at the instant the law became effective could not sell their receipts to any one who would thereafter be subjected to such payment unless, in order to meet the competition from other states, the present owners would deduct from their sale price the fifty cent per gallon which would be ultimately payable by the last owner of the receipt when he came to withdraw his whisky from bond, or remove it under bond out of Kentucky; nor does the Act purport to apply to the Kentucky owners of warehouse receipts of whisky stored in bond in any other states, upon their occupation of owning and storing, tax paying and removing such whisky into Kentucky; nor in any way apply to those persons who may have

previously tax paid and lawfully own their whisky for sale, such as druggists. Therefore, it will be contended that the Act is so arbitrary in its classification as to be void, and is, in fact, nothing more than a direct additional tax upon the property itself as is illustrated by the emergency clause, which is as follows:

> "8. Whereas, many persons * * * are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, *the liquor* which they are handling * * * is constantly in large quantities being removed from the bonded warehouses and disposed of, *without the State securing an adequate license tax thereon,* an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor." (Our italics.)

Section 2 requires sworn reports of bonded warehousemen only to be filed on the first day of June, 1920, and monthly thereafter, showing all the whisky in bonded storage, the number of proof gallons withdrawn or transferred.

Section 3 requires that:

> All bonded warehousemen "shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse * * * * or transferred under bond out of this State, up to the date of making such re-

port; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehouseman used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, *then the bonded warehouseman shall collect* and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth." (Our italics.)

Thus it is noted that the payment is to be made *by the warehouseman* to the Auditor, and that such *warehouseman is made a collecting officer* for the Commonwealth and subrogated to the Commonwealth's lien (if it is given a lien), and that there is no dealing between the owner and the Auditor or payment made by the owner of the whisky withdrawn to the Auditor, but the only transaction of the owner is with the bonded warehouseman, which, in turn, is put in such peril of liens upon its property and of the heavy fines to be now mentioned that the State, through indirection would force the tax from the owner.

Section 5 of the Act provides:

> That any one failing to report and pay "shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars, nor more than one thousand dollars, and each day after the date such report is due that such person * * * is in default shall be treated and considered as a separate offense."

It may be noted that the license and penalties could not be more sweeping or drastic; that the present tax repeals by omissions the 8% penalty on the tax due and withholds the right of the State to sue for the tax as provided in the old law but relies solely upon the liens and penalties to force obedience to the law, and that these penalties attach irrespective of whether default be willful or merely careless, or whether for one gallon or ten thousand gallons, and are in such an amount that no one could afford to risk the penalties while testing the validity of the statute by any ordinary proceeding in court.

The situation of the appellee (and thousands of other owners of warehouse receipts for whisky stored in Kentucky in bonded warehouses in Kentucky), was this:

It had bought from the Imperial Distillery Company, at Stanley, Kentucky, negotiable warehouse receipts at the time of manufacture in the Spring of 1916 for 10,000 gallons of whisky, which was stored in that distillery bonded warehouse. In December 1919 the Imperial Distillery desired to close its bonded warehouse and cancel its bond given to the United States Government, and the appellee consented to the removal under bond of its whisky to General Bonded Warehouse No. 1 conducted by the appellant, Louisville Public Warehouse Company, which received it and issued its negotiable warehouse receipts evidencing appellee's ownership. On April

—, 1920, appellee desired to move its whisky under bond pursuant to the laws of the United States to General Bonded Warehouse No. 2, Boston, Massachusetts, conducted by the Quincy Market & Cold Storage Warehouse Company. As heretofore stated appellant, Warehouse Company, declined to permit the removal of the whisky under bond unless the appellee would pay, in addition to all other charges which were tendered, the tax at the rate of fifty cents per proof gallon as levied by the Vance Act, claiming it was threatened with exorbitant fines, penalties and liens, if it should permit such removal without the payment of such tax. To pay the tax would consume more than one-half of the value of the appellee's property.

Appellee, therefore, brought this suit assigning the unconstitutionality of the Vance Act under the Fourteenth Amendment of the Constitution of the United States, because it would deprive the appellee of its property without due process of law and deny to it the equal protection of the law, and because the Act was invalid under the Constitution and laws of Kentucky, either as an *ad valorem* tax or as a license tax.

II.

THE TAX IS CONFISCATORY.

Before considering the legal phases it may be well to dispose of a question of fact raised by appellants and discussed in their brief, pp. 44 to 62, and applicable alike to the questions arising under the Federal and State Constitutions.

This question involves not simply an inquiry as to what portion of the value of the appellee's property may be appropriated by a tax of fifty cents per gallon, but as to what relation a tax of fifty cents per gallon bears to the general market value of all such property subjected to the tax. As a matter of fact the tax in appellee's case is demonstrated to be more than fifty per cent of the total value of its property and as heretofore noted the Act imposes a tax equal to 100% of the *ad valorem* valuation placed upon the whisky in bond for the current year by the Kentucky State Tax Commission, which under oath is charged with the duty of assessing all property at its fair cash value, and as a license tax is in the ratio of 2500% as compared with the formerly imposed license tax upon the occupation of manufacturing *in futuro* such distilled spirits.

After elaborate preparation by affidavits and evidence taken before the Commissioner, three Judges, constituting the lower court found the fact to be that the average market value of the whisky subjected to

the tax was not more than $1.25 per proof gallon, and that the tax amounted on the average to 40% of the value. Record, pp. 149-150.

Nevertheless the appellants elaborately re-argued this question in this Court. The argument proceeds upon the assumption that by taking an excerpt from an affidavit of a Louisville broker, speaking generally of all market values, and combining with that an excerpt from an affidavit of a broker of Cincinnati, Ohio, each offered by appellee, and combining with these, excerpts from the testimony of some of the witnesses called and examined by the appellants, the result is that the ordinary doctrine of supply and demand does not operate in this case, but that the owners of warehouse receipts of whisky in bonded warehouses located outside of Kentucky have taken advantage of the law passed in Kentucky to uniformly raise their price commensurately higher so that the Kentucky owners may still get the same price as prior to the passage of the Vance Act.

This contention is made notwithstanding the direct, positive and unequivocal proof from witnesses, both of appellants and appellee, that immediately upon the passage of the Vance Act the Kentucky owners were compelled to reduce the current price of their whisky so as to themselves absorb or bear the increased burden placed upon their property, if they wish to sell, or for the thousands of owners of small lots, who had bought for their own requirements, to either abandon their whisky or pay the tax.

The evidence is overwhelming and, in fact, it is conceded that more than half of the whisky in bond is stored outside of Kentucky, viz., that there are between sixty million and seventy million gallons of whisky stored in bonded warehouses in the United States, and of these approximately thirty million gallons are stored in Kentucky in bonded warehouses; that the whisky stored in bonded warehouses is represented by warehouse receipts issued generally at the time when the whisky was made by the distiller, and that these receipts are for small amounts and in the hands of thousands of owners, and that the market price of whisky fluctuates widely in short times owing to the ordinary causes of supply and demand and the prices vary according to the nearness of the particular commodity to the point of demand.

The evidence shows that the current cost price of new whisky in bond was in 1916 from 50c to 75c per proof gallon; that the interest for the four years before it could be bottled amounted to about 25% of the cost, or from 12c to 17c per proof gallon; that the *ad valorem* taxes, warehouse fees and insurance premiums, and other charges, amounted to from 5c to 7c per proof gallon a year, or from 20c to 28c per gallon in four years; hence that the average cost of four-year-old whisky stood the owner from 80c to $1.15 per proof gallon against a sales price of from 70c to $1.25 per proof gallon, and that the contemplated profit of the ordinary owner of a warehouse receipt, for whisky in bond held for sale was figured

at a few cents a gallon, so that the tax of fifty cents per proof gallon could not possibly apply on the prospective profit of engaging in the business, but was an appropriation of from 40% to 50% of the owner's invested capital, levied, for a rightful ownership of four years, solely upon him if he or any subsequent owner of the receipt should exercise his right of property to withdraw his whisky from bond by tax payment or transferring it under bond out of the Commonwealth of Kentucky and even though this should be attempted immediately after the passage of the Act.

Appellants in this Court do not even refer to their incompetent and extraneous testimony as to the retail price of tax-paid, bottled and cased whisky, and special fancy brands, when offered by retail brokers to the drug trade, but as said before endeavor to combine excerpts from the testimony of various witnesses; and we will, therefore, limit our discussion of this question to a brief review chiefly of that testimony to which the appellants now refer.

The appellee's evidence establishes the general market value of whisky in bond and sold through a transfer of warehouse receipts at from 70c to $1.25 original proof in bond. This proof is made, without substantial contradiction, by brokers and dealers of wide experience in market values.

George R. Landen, of Cincinnati, fixes the value at from 85c to $1.00; Record, p. 28; Samuel Freedman, of Cincinnati, fixed the current market values

at from $1 to $1.25 if stored in Kentucky, and from $1.50 to $1.75 if stored out of Kentucky; Record, pp. 23, 24; Milton Barkhouse, of Louisville, Kentucky fixes a valuation of from 80c to $1.00 per gallon with a loss of approximately 50c upon goods stored in Kentucky; Record, p. 26; Thomas S. Jones, of Louisville, Kentucky, fixed the current market price at from $1.00 to $1.25 per proof gallon; Record, p. 25; James Thompson, of Louisville, Kentucky, who fixed the current market price at from 75c to $1.25 per gallon; Record, p. 30; all substantially supporting the allegation of the verified petition of the appellee who alleges its whisky to be worth from 75c to $1.00 per gallon. Record, p. 13.

The appellants' only relevant evidence on this subject is to the same effect. William J. Gorman, of Frankfort, Kentucky, says, Record, p. 88, that he sold since March 12th whisky, which was made in the Spring of 1913, around one dollar, the highest being $1.10 per gallon. This whisky represented 75% more carrying charges than the appellee's whisky made in 1916. And he also says distinctly, Record, p. 96, that the present value of these fancy brands of whisky is approximately $1.00 per proof gallon, and that prior to the passage of the Act in question it was practically $1.50 per proof gallon; and again on page 98, that the State Tax Commission of Kentucky, charged with the duty of valuing all property in the State at its fair cash value, placed a valuation upon whisky in bond of $25.00 per barrel or 50c per gallon; and,

again, pp. 100 and 101, he identified an advertising circular of Freedman & Richards, dated May 11th, showing quotation of Old Crow Rye at $1.15 per gallon in bond, and other whiskies, including Rye, located out of Kentucky, selling at from $1.25 to $1.40 per gallon, and quotations on Kentucky whiskies of that date at from 95c to $1.25 per proof gallon.

Appellants' witness, A. B. Flarsheim, Record, p. 104, states that he is selling his whisky above the average price, by means of an expensive force of traveling salesmen, selling to the retail trade, but is receiving gross only about $1.40 per gallon. On page 106 he stated that the average price for Kentucky goods is about $1.00 per gallon, "some lower and some a little higher"; that for "goods stored in the market nearest the average consumption, which is New York and Boston," they bring from 50c to 75c higher.

Appellants' witness, Marion E. Taylor, of Louisville, Kentucky, Record, p. 113, says he has seen price lists recently where "you could buy a dozen different brands of Kentucky for less than $1.00 per gallon" but speaking of his particular brand of "Old Charter" says that he sold it at from $1.25 to $1.75 per proof gallon, and also stated that "some of that whisky that we have sold for $1.75 was in small quantities to retail customers." On page 111 this witness gives an illustration of his whisky stored in Kentucky where he offered the owner of a receipt $1.25 per gallon for it, and after the passage of the Vance Act bought it from the owner of the receipt at 75c a proof

gallon. He also gives an illustration, Record, p. 113, of owning 240 barrels of spirits made and stored in Cincinnati, which he sold recently for 60c per gallon, and owning 200 barrels of the same spirits stored in Kentucky which, in view of the fifty cent tax on the spirits, could not be sold at all. On page 114 this witness shows that there are between sixty and seventy million gallons of spirits in bond in the United States and substantially half of it beyond the border of Kentucky.

Appellants' witness, A. C. Thompson, of Frankfort, Kentucky, shows, Record, p. 117, that his distillery has shipped 75 barrels out of the twelve thousand barrels held in storage since March 12, 1920, and, Record, p. 118, all of this "was shipped to people who had owned the receipts for some time."

The foregoing must clearly establish that the current market value of whisky in bond in Kentucky, in the hands of the holder of a warehouse receipt, is from 70c to $1.25 per proof gallon and that, therefore, the tax is from 40% to 50% of its value.

III.

LICENSE TAX VOID UNDER KENTUCKY CONSTITUTION.

As said, the practice in Kentucky is to adopt licenses upon occupations as revenue measure and not necessarily mere police regulations. The Kentucky Constitution in its Bill of Rights by Section 13 provides:

> "nor shall any man's property be taken or applied to public use without the consent of his representative and without just compensation being previously made to him"

and Section 14 of the Bill of Rights of the Kentucky Constitution provides:

> "All courts shall be open and every person, for an injury done to him and his lands, goods, person or reputation, shall have a remedy by due process of law, and right and justice administered without denial or delay."

The Court of Appeals of Kentucky has many times held invalid as unconstitutional license taxes which were prohibitive of making *profit* in any lawful business. Even, therefore, assuming for the sake of argument that the Legislature might classify as an occuption "the business of owning * * *" whisky in bond, the proposed license tax in this case, even treating it as a single license tax and not as an annual license tax, as it is declared to be, is invalid, as the following cases from the Court of Appeals illustrate.

In Owen County v. F. & A. Cox Co., 132 Ky. 738, 743, the Kentucky Court of Appeals had before it a suit to enjoin the collection of a license tax of two hundred dollars imposed upon four-horse wagons hauling freight for hire on the county highways. The Court heard evidence as to what the tolls would have amounted to if the turnpikes had not been free and as to the wear and tear on the roads, upon the one side, and found upon the other, saying:

> "By the decided weight of the testimony of those who knew, it appears that the owner of a four-horse wagon, after paying the expense of running it and taking into consideration the depreciation in the value of the teams and the wagon itself, could make but little, if anything, more than the amount of the license tax imposed."

The Court further said:

> "The law is well settled that an injunction will lie to restrain the collection of an illegal tax."

And, again:

> "It may be conceded that ordinarily the reasonableness of a license fee imposed as a tax is a question for the taxing power, and the courts will not interfere with its discretion. (Citing authorities.) This rule we think, however, is subject to the limitation that the tax imposed shall not amount to a prohibition of any useful or legitimate occupation. (Citing authorities.) * * * We can hardly believe that the courts * * * would hold to be valid an ordinance *or*

statute imposing upon every physician and attorney at law an annual license tax of $10,000, or imposing upon every merchant a license of $5,000, or upon every washer-woman a tax of $1,000 per year. If a prohibitive license tax could be imposed upon the professions and occupations mentioned above, the same character of tax could be imposed upon every profession and occupation. It may be answered that no *legislative* or municipal body would ever do this. The question, however, is not what it would do, but what it might do. A powerful organization of men engaged in different pursuits might prevent the imposition of a prohibitive license tax upon their respective callings or occupations, but what is to become of the man without political power, whose means of livelihood are taken away by the imposition of a prohibitive tax? Shall we still say that the amount of the tax is within the discretion of the taxing power, or shall we say that among the inalienable and inherent rights guaranteed by our Constitution to every law-abiding citizen is the right to live and enjoy life and the right to acquire property, and that these rights necessarily carry with them the right to gain a livelihood and acquire property by following any useful or legitimate occupation, the pursuit of which is not injurious to the public weal? In our opinion there is but one answer to this question: If you deprive a man of the means of livelihood, you necessarily deprive him of the right to live and enjoy his life. Great as is the taxing power, it can never rise superior to the inalienable rights guaranteed by our Constitution. As the evidence in this case shows that the license tax in question is prohibitive, we have no hesitancy in declaring it invalid. (Citing authorities.)

> "Furthermore, the order itself shows that the owner of a four-horse wagon is required to pay three times as much tax as the man who operates a three-horse wagon, when there is nothing in the character of the wagons to justify such inequality. It may be conceded that a reasonable classification for the purpose of license taxes may always be made. Classification based upon the character of the vehicles and the number of horses used in connection with them may be proper (Citing authorities). But the classification sought to be made in this case is manifestly unequal and unreasonable. It can not be said to be reasonable because it bears alike upon all owners of four-horse wagons." (Our italics.)

In City of Louisville v. Pooley, 136 Ky., 286, the Court of Appeals had before it a license tax of one thousand dollars a year upon persons engaged in the business of loaning money on chattel mortgages or assignments of salaries and wages due or to become due. After hearing testimony as to what the net earnings of such companies amounted to and striking an average, the court found that the license would amount to from twenty-five to forty per cent of such *net earnings.* It was contended in that case that the "loan-sharks" were undesirable and engaged in oppressive methods upon the poor. The Court answered both questions as follows:

> "If this be the case we take it that such companies should be regulated by statute so as to remedy the evil. The taxing power should not be used to drive them out of existence."

Upon the second question, the Court said:

> "While it is true that the amount of a license fee imposed as a tax is ordinarily a question for the taxing power, and the courts will not interfere with its discretion, yet this court is committed to the doctrine that this rule is subject to the limitation that the tax imposed should not amount to a prohibition of any useful or legitimate occupation." (Citing authorities.)

Continuing, the Court said:

> "Furthermore, we have examined the license fees imposed on similar occupations, and find that the license fees in question are so much greater than the former that we conclude it was the purpose of the general council to make the license fees in question prohibitive."

The Court, therefore, affirmed the decision of the lower court holding the license to be void.

In Sallsbury v. Equitable Purchasing Co., 177 Ky., 348, 351, 354, the Court of Appeals of Kentucky again sustained an injunction against the imposition of a license tax upon a finding that it amounted to almost one-third of the net earnings of the business and was "unreasonable, confiscatory and prohibitive," the Court saying:

> "Notwithstanding the power of the city thus possessed, it is the settled law that a municipality in the exercise of the power may not impose a license tax in a sum that would be unreasonable, and which would amount to a prohibition of the continued engagement in that business. Ordinarily, and so long as the municipality stays

within the bounds of reason, the size of a license fee is a question for its determination, and so long as it exercises a reasonable discretion the courts will not interfere on the ground that the fee is unreasonable or prohibitive. This rule is of universal recognition and application, and we will not encumber this opinion with authorities.

"The unlimited freedom from judicial control does not extend to taxes imposed upon trades, occupations or professions. Bells Gap R. Co. v. Pennsylvania, 134 U. S. 232; Connolly v. Union Sewer Pipe Co., 184 U. S. 540. And the courts, when the question comes to them, have the undisputed right to determine whether or not a legislative act is in violation of the constitution, although its purpose may be the raising of revenue. Thierman Co. v. Commonwealth, 30 Ky. Law Rep. 72; Ragland v. Anderson, 125 Ky. 141.

"In the exercise of the authority to control the levying of occupation taxes, this court in a number of the cases held the license to be so high as to amount practically to a prohibition of the business, and, therefore, invalid and void. * * *

"It is recognized in the case of C. & O. R. R. Co. v. City of Maysville, 24 Ky. Law Rep. 615, that although the attempted regulation may properly come within the valid exercise of the police power there may be cases so extreme in their nature as to authorize the courts to interfere and to declare the attempted exercise of the power invalid. This right of the court to interfere in such extreme cases is upheld in the cases of Town of LaGrange v. Overstreet, 141 Ky. 43; City of Versailles v. Kentucky Highland Railroad Co., 153 Ky. 83, and Tandy & Farley Tobacco Co. v. City of Hopkinsville, 174 Ky. 189.

"In the City of Versailles case, quoting with

approval from the Overstreet case, this court said: 'But, extensive as their (municipal) authority is, there is the limitation and restraint upon its exercise imposed by well-established principles of law, that it must not be used in an unreasonable, arbitrary, capricious or oppressive manner, or to gratify malice or ill-will.'

"Numerous other authorities, both from this and other courts, might be cited in substantiation of the principle, but we deem it unnecessary, as the right of the courts to control the attempted regulations in such extreme cases is so universal, sound, proper and just that we presume no one will question it."

In conclusion, the Court said:

"In short, we hold that no municipality under a free government like ours has the power, either through the guise of regulation under the exercise of its police power, or in the imposition of license taxes, to so burden a legitimate business as to render it wholly unprofitable and to necessitate its abandonment."

Many similar decisions of the Court of Appeals of Kentucky may be quoted from but for brevity we merely refer to them. Hager, Auditor, v. Walker, 128 Ky. 1, 9; Sperry & Hutchinson v. City of Owensboro, 151 Ky. 389; Tandy & Farley Tobacco Co. v. City of Hopkinsville, 174 Ky. 189.

Applying these decisions to the present tax it is only necessary to observe that the Vance Act by its term and operation is a levy instanter on the static condition of owning whisky in bonded warehouses in Kentucky.

It has no relation to future profits to be derived from engaging in a business, nor is it attempted to be made commensurate with profits which might be earned in such business, but imposes the tax directly on present owners who, by virtue of the existence of the law must pay for the persons who may subsequently acquire the negotiable warehouse receipts, and may at some indefinite and undetermined future time endeavor to tax pay or to remove under bond their whisky and be held liable therefor, because to sell their warehouse receipts in competition with the thousands of owners of warehouse receipts in other states the present owners must deduct from their sale price the tax which will subsequently attach to the final owner of the negotiable receipt when he undertakes to withdraw or remove his whisky.

It has furthermore been shown that by no possible construction of this law could it be made a tax on the profits of the business but is, in fact, a seizing of the property itself.

Therefore, under the law of Kentucky as a license tax applicable only to present owners and wholly ignoring others, who may in due course acquire the property from present owners, the so-called license tax is void, and it is, as a matter of fact, as we will *hereafter show nothing* but a property tax in the disguise of a license.

IV.

ACT IS VOID FOR UNCERTAINTY.

One of the notable changes made in the phraseology of the Vance Act as compared with the preceding act, is that in the title it is declared to be "An Act imposing an annual license tax," and under Kentucky Constitution, Section 51, it is required that the subject of the act "shall be expressed in the title," of which the Kentucky Court of Appeals says:

> "So that the matter of selecting an expressive and accurate title is committed directly to the Legislature, and its being fairly expressive of the context of the bill is an imperative condition to the validity of the act. It is essentially a part of the act, not only because it has been selected and adopted by the Legislature as one of the tests of their meaning as expressed in the bill, but because the Constitution has made it a part, *and the controlling part*, of the law to which it applies. It is therefore not only useful, in affording a fair index of the legislative intent in case of ambiguity in the context, *but it must be read in connection with the remainder of the act* —as a part of it—in determining what is the law." (Our italics.)
>
> Commonwealth v. Barney, 115 Ky. 475, 478; Joyce v. Woods, 78 Ky. 386.

And Section 1 of the Act joins together the manufacturer *in futuro* of distilled spirits and the owner of existing spirits in bond, and declares that they

> "shall pay an annual license tax * * * of fifty cents on every proof gallon of said distilled

spirits so manufactured or stored in a bonded warehouse, *or* withdrawn from a bonded warehouse or transferred therefrom under bond out of the Commonwealth of Kentucky."

The appellants admit that this means "an annual license tax" measured by the volume of business so far as the manufacturer is concerned, but they say as officers they will construe the third section of the Act, as to when payments are to be made by the warehouseman, to mean one payment only upon each gallon of whisky stored in bond, irrespective of how long it may have been in bond, and that they will construe the language last quoted in connection with the preceding clause, and with the title of the Act, so as to read the disjunctive "or" as a conjunctive "and."

If the title of the Act is so potent in the latter respect, why not equally so as to the words "annual license tax"? And if this is an annual tax as to the manufacturer, why is it not equally so as to the owner who is joined with the manufacturer in the same sentence? Again they answer, because if an annual tax as to the owner it would clearly be spoliation and such construction must be avoided to save the Act.

But they can not bind the courts of Kentucky, nor is their interpretation a protection to the owners who they ask to take the risk. In Thompson v. Commonwealth of Kentucky, 209 U. S. 340, 346, it was said:

"Due process of law does not assure to a tax payer the interpretation of laws by the executive

officers of a state as against their interpretation by the courts of the state, or relieve from the consequences of a misinterpretation by either * * *. It is the province of the courts to interpret the laws of the state and he who acts under them must take his chance of being in accord with the final decision. And this is a hazard under every law and from which, or the consequences of which, we know of no security."

A further illustration of the uncertainty of the Act is that the fourth section provides a license tax of fifty cents per gallon on the distiller for whisky hereafter manufactured, and, apparently, the subsequent owner, when he withdraws the spirits from bond, if the law is valid, will have to pay an additional fifty cents per gallon. But again appellants come to the rescue of the Act with the suggestion that they will construe the Act to impose but one tax on the combined business of the two so-called occupations, and that they will leave (appellants' brief, p. 30) the apportionment of this one tax between the various parties.

They further argue (appellants' brief, p. 34):

"The evident purpose of the Legislature was that this entire business of distilling, owning, storing and removing from bonded warehouses, should bear only the one tax as an occupation tax. The fact that a portion of the Act constituting the business has already been performed at the date of the passage of the law could in no wise affect the validity of the Act."

If, then, on subsequent manufacturers the license on the business of manufacturing is to be pro rated, or "split fifty-fifty," between the manufacturers and the business of the subsequent owner in withdrawing, and the distiller, who manufactured the appellee's whisky four years ago, was not subjected to any tax, and, in fact, has gone out of business, there is clear discrimination against the present owners of whisky, in that they will be required to pay a tax which was not levied against the distiller and their occupation will be subjected to an unequal burden on the same class of business with the owners of whisky subsequently produced.

Section three of the Vance Act asserts a lien for the Commonwealth not only on the property of the warehouseman used in connection with the storage for the tax due from another, but also undertakes to assert such lien if one owner of whisky in bond withdraws it without paying the tax and the warehouse company fails to collect the tax from him "on all such spirits stored in such bonded warehouses" apparently without regard to the ownership of such spirits. It is too obvious to need argument that the property of A cannot be taken to pay the debt or taxes of B. This same section undertakes to give a lien upon the whisky of each individual for the tax which it seeks to impose on the whisky of every owner who withdraws the same. But this lien only arises after the whisky has been "removed or transferred" out of the

State, and, of course, out of the possession of the warehouseman. So it is very difficult to see how such lien could exist or be availed of either by the Commonwealth or by the warehouseman by subrogation thereto.

It is, therefore, submitted that the Act is so ambiguous, indefinite and uncertain as to render it void:

Commonwealth of Ky. v. L. & N., 20 Ky. L. R. 491.
L. & N. v. Commonwealth of Ky., 18 Ky. L. R. 42; quoted in McChord v. L. & N., 183 U. S. 498.
36 Cye 969, and cases cited.
First National Bank of Anamoose v. U. S., 206 Fed. 374.

V.

THE TAX VIOLATES THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

We fully concede the broad discretionary powers vested in the legislative branch of the State government to levy taxes and to classify property for the purpose of licensing business, and yet contend that action by the State may clearly be so purely arbitrary and beyond reasonable limitations and usage of laws, as to come within the inhibition of the Fourteenth Amendment of the Constitution of the United States as construed by this Court.

In G. C. & F. S. R'y v. Ellis, 165 U. S. 150, Mr. Justice Brewer speaking for this Court, after reviewing the subject of classification, p. 155 said:

> "Yet it is equally true that such classification can not be made arbitrarily. * * * These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed, and can never be made arbitrarily and without such basis."

Again at page 159:

> "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

Again at page 160:

> "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

Again at page 165:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles the statute in controversy can not be sustained."

In Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, Mr. Justice Bradley, speaking for this Court, only limited the equality clause of the Fourteenth Amendment in its application to state tax systems, which were adopted in proper and reasonable ways, and where the state proceeded within reasonable limits and general usage, and said:

> "But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the

subject, that would include all cases. They must be decided as they arise."

In Barbier v. Connolly, 113 U. S. 27, 31, Mr. Justice Field speaking for this Court said:

> "The Fourteenth Amendment * * * undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary *spoliation of property*, but that equal protection and security should be given to all under like circumstances, in the *enjoyment of their personal and civil rights;* that all persons should be equally entitled to pursue their happiness and acquire *and enjoy property* * * *." (Our italics.)

In Henderson Bridge Company v. City of Henderson, 173 U. S. 614, Mr. Justice Harlan, speaking for this Court said:

> "It is conceivable that taxation may be of such a nature and so burdensome as properly to be characterized a taking of private property for public use without just compensation.
>
> "But in order to bring taxation imposed by a State or under its authority within the scope of the Fourteenth Amendment of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation *is really spoliation under the guise of exerting the power to tax.*" (Our italics.)

No court has more vehemently asserted the protection of private property under the constitutional

guarantees than Chief Justice Robertson, of the Court of Appeals of Kentucky, in the early case of City of Lexington v. McQuillan's Heirs, 9 Dana. 513-517, where, speaking of the Kentucky constitutional limitations upon taxation, he said:

> "The object of this great guarantee was to secure every citizen against spoliation by a dominant faction, or by a rapacious public power, acting in obedience to the will of a constituent body for whose use his property may be taken, and from whom no similar contribution is required. It intended that public responsibility, and the power of exaction for public use, should be, in some degree, commensurable; and, therefore, it should be understood as providing that the public shall not take the property of any citizen for its own use, without his consent, or an equivalent in money, or in similar contributions by itself.
>
> "If this be not its practical effect, it is a mere *brutum fulmen*, and may always be evaded by exactions *made in the false semblance of taxation.*" (Our italics.)

Let us apply these principles to the Vance tax.

First, is it an occupation tax and found upon any proper classification; or, second, is it an *ad valorem* tax.

License taxes have been frequently imposed in Kentucky on the privilege of engaging *in futuro* in various occupations, but in no instance has there been any imposition of a tax on an occupation or doing business comparable either in rate or classification to the Vance Act.

Probably the heaviest license tax ever imposed in Kentucky was the license tax "for the privilege of doing the business" of producing crude petroleum, which was based on 1% of the actual value of the oil produced from the well, and sustained because such an occupation took from the state one of its natural resources. Raydure v. Board of Supervisors, 183 Ky. 84-99.

As heretofore noted the tax on the occupation or privilege of engaging in the business of manufacturing, storing and selling double stamp spirits was at the rate of two cents per gallon, whereas the tax now imposed is fifty cents per gallon or 50% of the total value of the property when the owner merely endeavors to exercise his right of ownership by having his existing property removed under bond out of the state.

The Act purports to levy the tax on the owners of negotiable warehouse receipts issued by Kentucky bonded warehouses, irrespective of their occupation or residence, but does not endeavor to tax the residents of Kentucky who own negotiable warehouse receipts for whisky in bonded warehouses outside of Kentucky, even though they may withdraw and remove such whisky to Kentucky.

The Act excludes from its operation those owners of tax paid whisky who had removed it to free storage warehouses, but hold negotiable receipts therefor which they might, if licensed, sell or use for their own purposes.

The Act purports that it is as much a doing business for a non-resident to withdraw the whisky whether the owner of the warehouse receipt, under the authority of the Volstead Act, purchased the warehouse receipt within one hour before the time withdrawal or removal is demanded, as it is for a resident to leave his whisky in bonded storage for years for the purposes of ageing.

The Act gave no option as to whether the persons to be affected might continue to engage in business, but seized, through its emergency clause, upon an existing condition, and was a deliberate effort to prevent the escape from the tax of any whisky in bonded warehouses in Kentucky.

There is no conceivable or suggested reason for any distinction in the licensing of "the occupation" of tax paying or removing under bond whisky from Kentucky bonded warehouses, and the exercise of any right of dominion over any other form of property, and especially since the passage of the prohibition acts whisky as a commodity has ceased to be a matter for police regulation but is a form of property used under license for pharmaceutical purposes and entitled to the same protection as any other form of property.

(1) Mere Ownership.

Furthermore, in seeking to single out a single act of ownership of one class of property, which under the laws of the United States does not even require the personal presence of the owner in Kentucky, and declaring that the license is for "engaging in such business," is a purely arbitrary and fallacious misnomer.

The Court of Appeals of Kentucky has many times construed what character of business may be licensed and as to what acts constitute "engaging in business" or "doing business" in the state, and has held that to constitute any business, occupation or profession which can be licensed "it must be a considerable part of one's occupation, business or vocation," or, as again expressed, it must be "a material part of his business." Hays v. Commonwealth, 107 Ky. 655, 658; Evers v. City of Maysville, 120 Ky. 74; Louisville Lozier Co. v. City of Louisville, 159 Ky. 178, 181; City of Newport v. French Bros., 169 Ky. 185; Commonwealth v. Chattanooga Implement & Mfg. Co., 126 Ky. 636.

These decisions construing what is an occupation or doing business are in perfect accord with the decisions of the highest courts of practically all the states of the Union and with the frequent decisions of this Court, in construing the Act of Congress of August 5, 1909, levying a special excise tax on cor-

porations for the carrying on or doing business by such corporations; Zonne v. Minneapolis Syndicate, 220 U. S. 187; McCoach v. Mine Hill R'y Co., 228 U. S. 295-303; and which are reviewed and approved in United States v. Emery, 237 U. S. 28-32, again reaching the decision that the corporation was not engaged in business, and saying:

> "The question is rather what the corporation is doing than what it could do, 228 U. S. 305, 306, but looking even to its powers they are limited very nearly to the necessary incidents of holding a specific tract of land. The possible sale of the whole would be merely the winding up of the corporation. * * * The claimants' characteristic charter function and the only one that it was carrying on was the bare receipt and distribution to its stockholders of rent from a specified parcel of land. Unless its bare existence as an intermediary was doing business, it is hard to imagine how it could be less engaged."

It is not conceivable that there could be less occupation or doing of business in Kentucky than is involved where the owner of whisky, represented by negotiable warehouse receipts and which whisky is stored in the only place permissible under the laws of the United States, forwards his receipt to one bonded warehouseman with instructions to forward the whisky under bond to another United States bonded warehouseman. This, as we will contend presently, is simply an act and incident of the right of ownership of property. It is not engaging in any business, and beyond the levy of the so-called occupa-

tion tax for doing of the business, is rested simply upon the last owner of the negotiable receipt who forwards it to the warehouseman and requests the forwarding of his property.

Therefore, for these reasons it is submitted that the Act is purely arbitrary in its classification and not within any of the reasonable limits or usages of such laws, and, therefore, comes within the prohibition of the Fourteenth Amendment as construed by this Court.

(2) Direct Property Tax.

The Vance Act is, in fact, and shown upon its face to be, a plain and direct tax upon one species of property. Appellants admit that if this is true the Act is clearly void under the Kentucky Constitution, which requires, in Sections 171-172, that all property shall be taxed uniformly by the jurisdiction levying the tax and all shall be appraised upon a uniform basis. This property has already been appraised and subjected to all the *ad valorem* taxes levied in the jurisdictions in which the property is located.

Not only is the license for the so-called occupation of removing the whisky measured by the quantity of whisky which may be covered by one warehouse receipt or one act of ownership, but the emergency clause clearly demonstrates that it was the property itself which the Legislature hoped to seize. Section 8, in part, provides:

"And whereas, *the liquor* which they are handling and in which they are dealing is in large quantities being removed from the bonded warehouses and disposed of, without the State securing an adequate license tax *thereon*, an emergency is hereby declared to exist * * *" (Our italics.)

Section 6 of the Act, in distributing 65% of the tax to the road fund and 35% to the general expenditure fund, conclusively shows that the revenue to be raised was not for the purpose of protecting or regulating either the whisky already subject to *ad valorem* taxes or the business or occupation of the owner.

That the tax rests upon the property and not upon an occupation is made perfectly apparent by noting the operation of the so-called license tax. It is levied instanter through the Emergency Clause upon the then owners of whisky in bond. They could not even transfer, as appellees desired to do, their own property under bond out of Kentucky nor could they dispose of their property through a sale of their negotiable warehouse receipts because no prospective purchaser could be found who would buy such receipts when offered in competition with the vast amount of whisky stored in bonded warehouses in other States than Kentucky, unless the owner desiring to sell, would himself absorb or deduct from the sale price the prospective tax which such subsequent owner would be compelled to pay to secure his property when he desired to taxpay it and withdraw it

from bond or transfer it under bond out of the Commonwealth of Kentucky, and, therefore, it is apparent that "the occupation of owning, storing and withdrawing" is not taxed, because the only tax collected from any person engaged in such business, was that forced instanter upon the present owners with no election or opportunity upon their part to determine whether they would engage in such business or not. This tax is levied wholly irrespective of any possible profits to be derived from engaging in business but solely upon a static condition, as distinguished from engaging in a pursuit designed to earn an income or produce profits.

The owners of warehouse receipts for whisky stored in Kentucky had a property right and the only use which they could make of their property would be to withdraw it from bond and sell it to those licensed to buy or to remove it under bond for safer keeping and for like purposes. Either such removal under bond or withdrawing from bond is but the simplest act of ownership and without that right of ownership there is no property.

In Thompson, Auditor v. Kreutzer, 112 Miss. 165, s. c., 72 So. 891, the Supreme Court of Mississippi, in holding unconstitutional a license tax imposed upon the business of owning or holding more than one thousand acres of timber lands, said:

> "In order that a thing may be owned, some one must, of course, have a right to the ownership thereof. A tax on a thing is a tax on all

its essential attributes and a tax on an essential attribute of a thing is a tax on the thing itself. So that, a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right of ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership which is not also a tax on property."

In Thompson v. McLeod, 112 Miss. 383, 73 So. 193, the same court said of a license tax imposed on the business of extracting turpentine from trees:

"The act under review does not levy a privilege tax on the right or privilege of selling resin or the gum of the tree as originally extracted * * * but the privilege, if any, which is taxed, is the privilege or right of the owner or lessee of pine trees 'to extract turpentine from standing trees.' * * *"

"This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. * * *"

"There cannot be ownership of standing pine trees without an owner, and if you tax the standing trees with an *ad valorem* tax, and at the same time exact tribute from the owner as a condition precedent to his right to lay hands upon the tree, the state is imposing double taxation *upon the tree itself.*" (Our italics.)

The Court of Appeals of Kentucky, speaking through Judge E. C. O'Rear, in Standard Oil Com-

pany v. Commonwealth, 119 Ky. 75-80, had before it the validity of a state license on the business of conducting an oil depot where oil was stored in bulk, and after a consideration of the various license taxes which might be imposed, the law was upheld as a police regulation because of the highly inflammable and dangerous qualities of such property. But the court conceded that if the tax were not upon the occupation, the law would be void, saying:

> "The object of the license is to confer a right that does not exist without the license. * * * The right to own a house in which oil might be stored is not prohibited by any law. Consequently, the granting of a license for that purpose gives no right. The right of acquiring property and protecting it, found in the Bill of Rights, is even above the right of taxation, for the exercise of the former can not be denied until a license to exercise it has first been obtained from the State. * * *"
>
> "The authority of Livingston v. Paducah, *supra*, aside from the reasons already advanced, would force us to say that the tax in this case was also invalid, although imposed as a license and not a property tax, if the subject of it is the oil depot or building * * *."

Chief Justice Marshall said for this Court in Brown v. Maryland, 12 Wheat. 419, 444, in relation to a tax on the occupation of an importer, that it was the same as a tax on the imports, and, therefore, void.

> "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which

> is general, as if it were confined to a particular mode of doing the forbidden things. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

We submit it is equally obvious that for Kentucky to levy an occupation tax on the owner of a warehouse receipt covering whisky stored in United States bonded warehouses in Kentucky upon the exercise of his right of withdrawal, is just as clearly the levying of a tax on the commodity itself.

Again this Court said in Pollock v. Farmers' Loan & Trust Co., 157 U. S. 580:

> "The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."

This opinion reviews many cases of similar effect, such as Almy v. California, 24 How. 169, holding a duty on a bill of lading was the same thing as a duty on the article which it represented; Railroad Co. v. Jackson, 7 Wall. 262, that a tax upon the interest payable on bonds was a tax not upon the debtor but upon the security; and Cook v. Pennsylvania, 97 U. S. 566, that a tax upon the amount of sales of

goods made by an auctioneer was a tax upon the goods sold.

And this Court has frequently held that for the taxing authorities of a state to uniformly impose upon one class of property a different mode of assessment resulting in an inequality of a tax burden where uniformity of the tax burden was required, entitled the taxpayer to relief under the Fourteenth Amendment. Greene, Auditor v. L. & I. R'y Co., 244 U. S. 499; L. & N. v. Bosworth, 209 Fed. 380; s. c., 244 U. S. 522; Ohio Tax Cases, 232 U. S. 576, 587; Raymond v. Chicago Union Traction Co., 207 U. S. 20.

It is submitted that the Vance Act is clearly intended to subject all whisky in bonded warehouses in Kentucky to a tax at the rate of fifty cents per proof gallon, and is merely disguised by the unimportant name of a license tax upon the occupation of the owner, when such owner comes to exercise an inherent and necessary right of property; and, therefore, it is submitted that the appellee is entitled to the protection of the Fourteenth Amendment of the Constitution of the United States because of a denial to it of the equal protection of the laws and a taking of its property without due process of law.

VI.

JURISDICTION IN EQUITY.

A court of equity has jurisdiction because there is no adequate remedy at law, and there was danger of imminent irreparable injury to appellee.

Appellee owning 204 barrels of whisky in bond in Kentucky found itself confronted with a situation by reason of the provision of the Vance Act which precluded its selling its whisky in ordinary course of five or ten barrel lots to the drug trade unless it would sacrifice more than 50% of its invested capital; it could not sell its whisky in competition with that of other owners who had whisky in bonded storage beyond the jurisdiction of Kentucky and which supply, the proof shows to be sufficient to supply the demands of the United States for at least five years in the future; it had a commodity which was not only very expensive to carry but which, by natural loss, was subject to shrinkage and evaporation (the United States Government allows for this to the extent of seven and one-half gallons per barrel for the eight-years bonded period, but it is well known that the actual outage is even greater); and its commodity was in a United States bonded warehouse not equipped to bottle the whisky and not located nearest to the existing demand, which conditions were fulfilled by the United States bonded warehouse at Boston, Massachusetts.

Leaving out of view the numerous other owners of approximately one million barrels of whisky in Kentucky, situated similarly as appellee, the appellee owned 204 barrels, and had the legal right, under the laws of the United States, and by virtue of its ownership, to withdraw this whisky in small lots of five and ten barrels for the drug trade month by month, or at longer periods if it so desired, or as it could dispose of its commodity.

The Commonwealth was asserting a lien upon appellee's whisky and demanding that monthly payments should be made by appellee thereunder to the appellant warehouseman, who in turn would account to the Auditor, and who alone had any dealings or relations with the Auditor or State treasury.

If appellee paid the warehouseman it had no control over it as to when and how the latter would pay the money into the State treasury, or as to whether it would pay under the "mistaken belief" that the tax was not due, or pay under protest. The warehouseman is not by law or the regulations made by the Department required to keep any record of its transactions with the storer, or to make any report whatever to the Commonwealth of Kentucky as to whose whisky has been withdrawn, but is solely, under the second section of the Act, required to report how many proof gallons in the aggregate have been withdrawn from its bonded warehouse and to pay the tax thereon.

The only remedy of appellee would be against the warehouseman in a suit to recover its payments, and the warehouseman might or might not prove solvent to respond to a judgment, if obtained.

It is suggested by the appellants, that the appellee might wait indefinitely for some one else to test the constitutionality of the law, but the penalties announced in the Act are such that, unless a court of equity will act, no one would come forward and take the responsibility of the test case. In the meantime the appellee's whisky would be depreciating in value through "outage" and the carrying charges for warehouseman's fees, insurance premiums, state, county, city, road and school taxes, might preclude the possibility of ever realizing on the investment.

In this situation appellee's right to resort to equity is founded upon the following principles: *first*, as the courts of Kentucky have adopted the rule that an illegal tax levy upon personalty creates a cloud which equity will remove, and that such a levy may be enjoined because a remedy more direct and effective than a suit to recover back after the money has been commingled with public funds, "a party by going into the national courts does not lose any right or appropriate remedy of which he might have availed himself in the state courts in the same locality"; *secondly*, the Federal rule is that the remedy at law must be plain, adequate, practical and efficient, and the suggested remedy at law by paying and suing for a refund under Kentucky Statute, §162 does not ful-

fill any of these requirements; *thirdly,* to avoid a multiplicity of suits; and *fourthly,* because of the numerous and excessive penalties.

(1) Federal Courts May Adopt Available Equity Proceedings of the Local State Court.

1. The Act plainly endeavors to create a lien upon the appellee's personal property and under the equity jurisdiction of the courts of Kentucky they will remove the cloud created by an illegal tax levied upon personalty. Gates v. Barrett, 79 Ky. 295; Negley v. Henderson Bridge Co., 107 Ky. 414.

The equity jurisdiction of the courts of Kentucky to restrain an illegal tax levy may be at variance with the equitable remedies adopted in other jurisdictions, but it is nevertheless one of the remedies afforded by the equity jurisdiction of Kentucky.

In the case just cited of Gates v. Barrett, 79 Ky. 295, the appellees were residents of Henderson County and reported their personalty for taxation, but were also assessed by Daviess County on the sum of twenty thousand dollars employed by them in that county in the purchase of tobacco, and the Court of Appeals of Kentucky said:

> "The right to have an injunction to restrain the collection of an illegal tax has been so long recognized and acted upon in this state that it is unnecessary to stop to inquire upon what ground that jurisdiction is exercised by courts of equity. The jurisdiction in this case, however, may be

placed upon the ground of the inadequacy of the remedy at law."

In Norman v. Boaz, 85 Ky. 557, 560, the last quotation was approved by the Court of Appeals with the addition of the statement that it would follow this rule *"whatever may be the rule in other states."*

In Baldwin v. Shine, 84 Ky. 502, 516, the court enjoined the making of an assessment by a county judge based upon a statute permitting the county judge to assess property wholly omitted from taxation, and in granting the injunction said:

> "The question arises in limine whether the remedy by injunction will lie. In many of the states equity will not enjoin even the collection of an illegal tax; and much less an assessment, because the assessor is regarded as a *quasi* judicial officer. It is said that public policy, which will not brook delay in the public business, requires this rule.
>
> "It seems to us, however, that the evils flowing from its enforcement overbalance this consideration. It is an object of equity to foresee and prevent wrong. One of its principal offices is to avoid multiplicity of suits and circuity of action. By this rule the tax payer is left to sue the collecting officer. This is unjust to both. It produces expensive litigation between two innocent parties, one of them being involved in it by reason of an honest effort in official duty. The courts of Illinois, Indiana, Pennsylvania, and some other states, including this one, have discarded this rule, and hold that a court of equity may enjoin the collection of an illegal tax."

In Fiscal Court v. F. & A. Cox Company, 132 Ky. 738, the Court of Appeals of Kentucky said:

> "The law is well settled that an injunction will lie to restrain the collection of an illegal tax."

Appellants strenuously relied in the lower court, and in this Court rely, upon the injunction of the Franklin Circuit Court in the case of S. Rosenbloom & Company v. E. H.Taylor, Jr. & Company (Record, pp. 42-60), wherein a different plaintiff upon different grounds attacked the constitutionality of this same Vance Act, but therein secured an injunction which is relied upon as a bar to the further prosecution of this proceeding, under Section 266 of the Judicial Code. This case, however, illustrates that the Courts of Kentucky are taking cognizance of suits to enjoin and are enjoining the collection of this tax.

It has been held for years that the equity jurisdiction extends to cases of injunction against illegal collection of taxes in the State of Kentucky. *In Louisville Trust Co.* v. *Stone, Auditor,* 107 Federal, 305, 309, the Circuit Court of Appeals for the Sixth Circuit said:

> "The federal jurisdiction having been properly invoked, we may examine into the other questions made in the case, notwithstanding as to them there may be a remedy in the State Court. In Bank v. Stone (C. C.), 88 Fed. 383, heard in the Circuit Court before Justice Harlan and Judges Taft and Lurton, it is expressly held

that *an action in equity will lie to enjoin illegal taxation in Kentucky, as the Statutes of that State do not afford an adequate remedy at law.*" (Our italics.)

If parties suing in the state courts of Kentucky have the right or appropriate remedy, which will be administered by the courts of Kentucky in equity, it is clearly established that the Federal courts may, in their discretion afford to parties rightfully suing in the Federal Court the same relief.

Thus it is said in Simkins' work styled "A Federal Equity Suit," page 18:

> "It has been frequently declared that 'a party, by going into the national courts, does not lose any right or appropriate remedy of which he might have availed himself in the state courts in the same locality.' Davis v. Gray, 16 Wall. 203-221; Sawyer v. White, 122 Fed. 227; National Surety Co. v. State Bank, 120 Fed. 593; Barber Asphalt Paving Co. v. Morris, 132 Fed. 945; Cowley v. Northern R'y, 159 U. S. 582."

We do not elaborate this point because the authorities cited in support of the text more than fully sustained it.

The resolution of this point in our favor really supersedes the necessity of considering the next point, but we shall nevertheless show in its consideration that there is no adequate remedy at law.

(2) No Sufficient or Adequate Remedy at Law.

This brings us then to a consideration of the chief attack of appellants on the jurisdiction in equity which is that an adequate remedy at law exists under Kentucky Statutes, Sections 162-163, which provide:

> "When it shall appear to the Auditor that money has been paid into the State treasury for taxes when no such taxes were, in fact, due, he shall issue his warrant on the treasury for such money so improperly paid in behalf of the person who paid the same."

The Act further refers to such payment by the taxpayer into the treasury as a "mistaken payment."

The question then arises whether this Act met the requirements of appellee's situation so that it might pay the money and sue the Auditor by a mandamus and secure a refund in the form of a State warrant, which under the practice of Kentucky would be paid with 5% interest from the date of issue one or two years thereafter.

In Boyce v. Grundy, 3 Peters, 210, 215, this Court in construing Section 267, Judicial Code (Section 1244, U. S. Compiled Statutes) said:

> "It is not enough that there be a remedy at law; *it must be plain and adequate,* or, in other words, as *practical and efficient* to the ends of justice and its prompt administration as the remedy in equity." (Our italics.)

In Walla Walla v. Walla Walla Water Co., 172 U. S. 12, this Court, discussing this subject, used the following language:

> "This Court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as *complete*, as *practical* and as *efficient* to the ends of justice and its prompt administration, as the remedy in equity." (Citing authorities.) (Our italics.)

In Davis v. Wakelee, 156 U. S. 680, 688, there was room for a doubt as to the actual state of the law of New York with reference to a material point in that case. The defendant objected to the maintenance of the bill in equity in that case on the ground that there was a remedy at law. This Court adverting to the doubtful character of the legal remedy said:

> "In the uncertainty which appears to exist in that State, as to whether a complaint setting forth all the facts would or would not be demurrable, we think it may be fairly said that *the remedy at law is not so plain or clear as to oust a court of equity of jurisdiction.* It is a settled principle of equity jurisprudence that, if the remedy at law *be doubtful* a court of equity will not decline cognizance of the suit. (Citing authorities.) Where equity can give relief plaintiff *ought not to be compelled to speculate upon the chance of his obtaining relief at law.*" (Our italics.)

In the recent case of Union Pacific R. R. Co. v. Weld County, 247 U. S. 282, 285, the District Court denied the injunction and dismissed the bill on the ground that a statute of Colorado afforded adequate relief at common law by a suit against the Board of County Commissioners levying the tax. This judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit, 217 Fed. 540, which on petition for rehearing adhered to its position, 222 Fed. 651.

The Colorado statute in question was very much clearer and stronger than the provisions of Section 162 of the Kentucky Statutes, as we shall presently show.

This Court reversed the judgment of the lower courts and held that the remedy afforded at law by the Statute of Colorado was "not free from difficulty" saying:

> "An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. The question is purely one of state law, and, so far as we are advised, the Supreme Court of the State has not passed on or considered it. A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law. On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, the situation is

not one in which cognizance of the present suit properly can be declined.

"With the question of equitable jurisdiction out of the way, the District Court should dispose of the application for a temporary injunction on the merits and otherwise proceed with the suit in regular course."

Let us apply these principles to Section 162 of the Kentucky Statutes in appellee's case.

This Section 162 of the Kentucky Statutes has been construed in many cases by the Court of Appeals of Kentucky.

In Greene, Auditor v. Taylor, 184 Ky. 739, the Court of Appeals of Kentucky said:

"If one, with a knowledge of the fact that he did not owe the tax, should voluntarily pay it into the treasury, upon what could he base a right to ask a court of equity to exercise its powers and processes to compel a return of it to him? As said in Tyler, *et al.*, v. Smith, 18 B. M. 707, 'the doctrine is well settled, that where a man demands money of another as his right, and the other, with a full knowledge of all the facts and of his rights, voluntarily pays the money thus demanded, he cannot recover it back. Bean v. City, etc., 22 Ky. L. R. 415; City of Maysville v. Milton, 19 Ky. L. R. 1032."

Again it is said in this case:

"However, as regards the payment of taxes * * * the general rule which now prevails is that taxes paid to counties, cities, towns and county officers, collecting the state's revenues and *other collecting officers*, if the taxes are voluntarily paid, they cannot be recovered, al-

though not due, and paid under a mistake of law. City of Louisville v. Anderson, 79 Ky. 334; L. & N. v. Hopkins County, 87 Ky. 605; L. & N. v. Commonwealth, 89 Ky. 531." (Our italics.)

Appellants rely upon the second opinions delivered November 16th and November 23, 1920, on petitions for rehearing from the first opinions rendered March 9, 1920, in the companion cases of Craig, Auditor, v. Security Producing & Refining Company and Same v. Frankfort Distilling Company. For convenience the first and second opinions are printed in parallel columns in the appendix, p. 97.

These last opinions, as we will next discuss, overrule *some* of the previous well-settled conditions precedent to recovery back from the State Treasury but *still adhere to the above mentioned conditions precedent,* and in fact emphasize them, as excerpts from the opinions will show. The italics throughout are our own. It was said—

That there must be "proper application *by the person paying* the same";

That it must appear that

"demand has been made for its return *within the time and in the manner* provided by Section 163";

That the payment must have been made

"through the mistake or inadvertence *of the taxpayer, directly into the Treasury or to the Auditor*";

But that taxes paid to

> "sheriffs * * * *and other collecting officers* cannot be recovered although not due and paid under a mistake of law";

And again that

> "the auditor is not required to go into or review assessments of taxing agencies to determine whether the payment is due or not";

But if all the conditions have been complied with

> "he shall issue his warrant on the treasury * * * *in behalf of the person who* paid the same";

And again

> "but he will be held to strict accountability and in doubtful cases refuse payment until the question has been determined by the courts";

And

> "he may be compelled by mandamus to issue his warrant on the treasury in repayment of the sum."

What then are these requirements; *first*, the money must be paid into the treasury of the State and must be paid by the tax payer to whom the Auditor's warrant may issue; *secondly*, that there must be a mistaken belief that the tax was due; *thirdly*, that the tax must be paid under protest; and, *fourthly*, if paid to any other collecting officer for the Commonwealth it cannot be recovered back.

Under the terms of the Vance Act the appellee makes no report to the Auditor nor pays any money whatsoever into the State treasury. As to it no public record is kept upon which to determine what payments the appellee may have made, or to distinguish its payments from the payments of all other owners to the warehouseman, who alone is required to report on his gross quantity on hand, gross withdrawals, and show the net balance remaining in storage, and it is against the warehouseman that the liens and penalties are primarily aimed.

Appellants frankly admit in their brief, p. 36, that by this law the warehouseman is made

> "*the collecting agency of the State* and he is required to make the reports, showing the amount of the tax due on each reporting day. * * * No separate tax is required of the owner and storer of liquor as long as it remains in the bonded warehouse."

And appellants' counsel might have added, nor is any form provided by the Auditor's office, nor contemplated by the Act, for the owners to ever make any report whatever to the Auditor nor to pay any money into the treasury or to Auditor.

The State of Kentucky has many collecting officers and collecting agencies and those collecting the greatest part of the State's revenue are the one hundred and twenty (120) county sheriffs who account for their collections to the Auditor and pay them into the State Treasury (Kentucky Statutes, 4143) and

payments to them have been and are expressly held not recoverable, though not due and though paid by mistake, and *in no case* has it ever been decided in Kentucky, so far as we can discover, that money can be recovered back *when it has been paid to a collecting agency.*

This thought is but further illustrated when it is recalled that the appellants are most strenuously insisting that only one tax is imposed (appellants' brief, pp. 32-35). It would be imposed instanter upon appellee if it exercised the property right of having its whisky removed under bond out of the Commonwealth of Kentucky. It would also be imposed if appellee had, instantly after the passage of the Act and its approval by the Governor, attempted to dispose of its warehouse receipts to those who under the Volstead Act would have the right to tax pay the whisky and withdraw it from bond because under the ordinary laws of competition and of supply and demand no subsequent prospective purchaser of warehouse receipts would buy receipts on whisky stored in Kentucky unless the owner reduced his price and thereby paid the tax which would subsequently be demanded upon the withdrawal or tax payment of the whisky.

Therefore, as it has been heretofore argued, the tax is one levied directly on the property itself.

But if the tax is so deductible from the present owner it is not even paid by him to the warehouse but must be paid by the unknown final owner who withdraws the whisky from bond or removes it out of

Kentucky under bond, only in the uncertain and, perhaps, far distant future, when he comes to exercise his so-called occupation of owning, storing and withdrawing, but the *appellee* has in fact lost the equivalent of the tax *through the deduction from the sale price.* Thus it may be said the *present owners* of the warehouse receipts pay the tax in advance *for the final unknown owners* when they shall hereafter come to engage in the business, but the present owners have no privity or relation whatever either with the warehouseman, or the State Treasurer or the Auditor. It does happen that the warehouse company's books in this case would show appellees' name as the original party to whom the negotiable warehouse receipt was issued, but thousands of owners are holding warehouse receipts which have been issued to others and simply transferred to them by indorsement and delivery, so that such *present owners,* when the law became effective, *are absolutely unknown to the warehouseman* or to the Auditor and there would be no means of their establishing their payment or loss.

In such circumstances the appellee had no means of knowing whether the warehouseman would keep a separate record of its transactions, or would make a payment under protest, or as to whether the warehouseman believed the tax to be valid and due, or knew or felt certain that the law was invalid and the tax was not due, but nevertheless might proceed to

pay it into the State treasury without protest and bar appellee's recovery.

Appellee cannot sue at law for a State warrant under Section 162 of the Statute, because *it is not required to and could not pay the money into the State treasury,* and the Auditor has no record as to the amount which might be due to the appellee. The warehouseman might or might not keep a correct record, and it might require a law suit against the warehouseman to determine appellee's proportion of the total payments made by the warehouseman.

It cannot, therefore, be said that the appellee had any *clear and definite remedy* or standing under this statute, or that the Federal courts, to which the appellee had the right to resort, would create or set up means of affording relief to appellee in the light of the principles for repayment long adhered to by the Court of Appeals of Kentucky.

Furthermore at the time this suit was filed and the injunctive relief was granted and the property removed and the bond given, the Federal jurisdiction in equity was most clearly sustained. Section 162 of the statute as *then* construed by the Court of Appeals of Kentucky in its *first* opinion in the case of Craig, Auditor v. Frankfort Distilling Company, decided March 9, 1920, required as further conditions precedent to the right of a tax payer to recover, in addition to all the requirements above described, that the tax could not be recovered unless the collec-

tion thereof could be enforced by distraint, the court saying:

> "The tax here sought to be recovered is not such as could have been distrained, but the Commonwealth could have enforced collection, if at all, only by an action at law. This would not have amounted to distraint; and taxes collectible by actions only, as in this case, and paid without such suit, are paid voluntarily and are not recoverable by the payor * * *."

It was further held that such tax could not be recovered because the tax payer had not exhausted his legal remedies in resisting it, the court saying in this respect that

> "it was entitled to have a rehearing had it requested one, and when the Auditor certified the amount to the Treasurer the corporation had yet another chance to avoid payment, as it may then have enjoined collection of the taxes, but after all these steps had been regularly taken and the money paid into the treasury and mingled with other public moneys and distributed by the State, it was too late for the corporation to take the initial step to recover it.
>
> "It follows, therefore, that the Chancellor erred to the prejudice of the appellant in granting the mandamus, requiring the Auditor to draw his warrant on the treasurer for the money paid as tax when none were due."

Undoubtedly the tax in the case at bar is not recoverable by distraint but the Commonwealth has relied solely upon penalties and the lien on the property of the warehouseman, and there is no provision

in the Vance Act for a suit, but on the contrary the Act is an amendment in this respect of its predecessor, which in express terms authorized for default in payments suit to be brought for a recovery by the State.

Such was the law of Kentucky when this suit was brought and the appellee put to an election as to what it should do, or as to what jurisdiction it might seek, and *Federal jurisdiction in equity* clearly attached under the construction given to the state laws by the highest court *up to the time* when this suit was brought and the temporary relief prayed had been granted. But appellants now place their sole reliance in this respect upon the fact that the Court of Appeals of Kentucky, on November 16, 1920 (*long after this record had been lodged in this Court*), withdrew in the respects last mentioned its opinion of March 9, 1920, and rendered the decision quoted in appellants' brief, pp. 10 to 14, as the whole foundation for his argument that there was an adequate remedy at law under Kentucky Statutes, Section 162. In its last opinion in the Craig case the Court of Appeals, in respect to the necessity for distraint and of standing suit or exhausting the remedies, not only withdrew two previous opinions but overrules by name four previous decisions on this point and adds the blanket clause:

> "and all other cases announcing a similar rule insofar as they conflict with the construction herein given, Section 162 Kentucky Statutes are expressly overruled."

That, in this respect, the law of Kentucky was directly to the contrary from that now asserted by appellants is shown in the companion case of Craig, Auditor v. Frankfort Distilling Co., 189 Ky. 620, decided November 23, 1920, in which the Court said:

> "When the Auditor declined to issue his warrant on the treasury for said sum in favor of the Frankfort Distilling Company he transgressed the provisions of Section 162 Kentucky Statutes, and therein failed to perform his duties. This, of course, was brought about by a former construction given that section of the Statutes by this Court, and the Auditor is not to blame in the slightest degree. He was merely following the rule adopted by this Court."

Certainly the appellee cannot be "blamed in the slightest degree" for believing that there was no adequate remedy at law when he instituted suit in the Federal court in equity, nor the Federal courts for assuming that jurisdiction and granting the relief prayed.

We take it that the rule is clearly established that if at the time the suit was brought properly in equity and the jurisdiction has once attached it will not be defeated by subsequent events, statutes or decisions.

In Clark v. Wooster, 119 U. S. 322, 325, where equity jurisdiction was challenged upon the ground

that when the suit was begun for patent infringement there was insufficient time to obtain equitable relief and that incidental legal relief, for damages, must be therefore obtained at law, the Court said, referring to judicial discretion, p. 325,

> "We see no illegality in the manner of its exercise in this case. The jurisdiction had attached, and although, after it attached, the principal ground for issuing an injunction may have ceased to exist by the expiration of the patent, yet there might be other grounds for the writ arising from the possession by the defendants of folding guides illegally made or procured whilst the patent was in force. * * * But even without that, if the case was one for equitable relief when the suit was instituted, the mere fact that the ground for such relief expired by the expiration of the patent, would not take away the jurisdiction, and preclude the court from proceeding to grant the incidental relief which belongs to cases of that sort. This has often been done in patent causes, and a large number of cases may be cited to that effect; and there is nothing in Root v. Railway Co., 105 U. S. 189, to the contrary." Citing authorities.

Similar decisions are numerous—

Beedle v. Bennett, 122 U. S. 71.
Busch v. Jones, 184 U. S. 598.
Carnegie Steel Co. v. Colorado F. & I. Co. (C. C. A. 8th), 165 Fed. 195.
U. S. Mitis Co. v. Detroit, etc., Co. (U. S. C. C. A. *6th* Cir.), 122 Fed. 863, 866.

In Ransom, etc., Co. v. Martinstein, 167 Cal. 406, 409, 139 Pac. 1060, the suit was to foreclose a lien but

the plaintiff turned out to be entitled only to a personal judgment, and it was held that the jurisdiction in equity was determinable by the facts as they existed when the suit was commenced. The Court said, p. 1061—

> "It is said that 'the rule is almost absolute that the jurisdiction of equity is to be determined by the facts existing when the suit is commenced.' 16 Cyc. 113. Jurisdiction of the whole subject matter having attached by reason of the allegations of the complaint and the relief demanded therein, it appears to logically follow * * * that the court could proceed to the end and give such judgment on the merits as it found plaintiff entitled to as to Crooks, within the limits, of course, of the case made by the complaint against him."

In Lex., etc., v. Canton, 171 Mass. 414, 50 N. E. 931, plaintiff's water right was wrongfully interfered with under a supposed statutory authority and he was held entitled to damages assessed in a suit to enjoin interference, and not required to resort to the statutory method for assessing damages although the interference became lawful *pendente* through defendant's acts. The court said, p. 932—

> "When the bill was filed, the plaintiff was entitled to relief under it. Since the filing of the bill the defect in the original certificate filed by the defendants has been cured. The plaintiff, therefore, no longer has any just ground for the issuing of an injunction to restrain the diversion of the water. But speaking generally jurisdiction in equity is fixed if the plaintiff is entitled

> to relief at the time of the bringing of the bill, and the court will retain the bill and administer a remedy in damages, if that is appropriate, where the plaintiff loses his right *pendente lite* to purely equitable relief without fault on his part through some action on the part of the defendant."

In Rosin v. Mayer, 244 Mass. 494, 113 N. E. 217, where plaintiff sued for injunction, and rescission, and damages, and afterward waived his prayer for rescission, it was held that the court could nevertheless award the damages, the court saying, p. 217—

> "Jurisdiction in equity was fixed when they brought their bill in good faith seeking the equitable relief to which they were entitled. Lexington Print Works v. Canton, 171 Mass. 414, 50 N. E. 931. That jurisdiction was not lost when the court proceeded to award damages as the remedy adapted to the case under the circumstances then existing. * * * This practice is not confined to cases where the relief sought is prevented by act of a defendant, as in Stewart v. Joyce, 201 Mass. 301, 87 N. E. 613."

The apparent fact is that the Commonwealth of Kentucky, in the case of Craig, Auditor v. Frankfort Distilling Co., 189 Ky. 620, cited, *supra,* was confronted with a loss of fifteen hundred dollars and contends that in the present case it is confronted with a loss of fifteen million dollars, and when the petition for rehearing was filed, the Commonwealth of Kentucky did not oppose it in the slightest degree, but up to, and, indeed, after, the present suit at bar

was brought, was most seriously contesting and contending for exactly the contrary construction.

Beyond all this, neither the case of Craig, Auditor v. Security Producing & Refining Company, nor that of Craig, Auditor v. Frankfort Distilling Company, is by any means conclusive even on the points on which they are cited as contrary to the case at bar. In each of those cases, there was simply involved the plain question clearly expressed in the repealing clause of one corporation license tax that a prior corporation license tax was repealed, yet these companies, through what is admitted to be oversight and error and a mistaken belief that both taxes were due, paid the two taxes, and the Court of Appeals on the contentions by the Commonwealth above described denied a right to recovery in the first opinion, though it is said in the last opinion in the Security Producing & Refining Company case:

> "Such improper payment of money into the treasury as taxes cannot but appear to the Auditor by a glance at the statutes. He does not have to go into or review the attempted assessment made by the State Tax Commission, but need only to acquaint himself with the facts and look at the statutes imposing the tax on corporations to have it certainly appear to him that money has been paid into the treasury as taxes by the corporation when no such taxes were, in fact, due."

And, again, it was said:

> "It is conceded that the Security Producing & Refining Company paid through mistake of law the taxes for 1918 and 1919 under sections 4189a and 4189c, when it was required to and did pay to the state a license tax equal to one per centum of the market value of the crude petroleum produced by it. It thus paid two license taxes when it was liable for only one."

By way of *obiter dictum* the court further suggests that in doubtful cases the Auditor should decline to pay, and that the courts, if they find the conditions of the statute have been complied with as to a mistake having been made, that the money was paid into the treasury when the money was not due, etc., may grant a mandamus to the tax payer on the ground of the invalidity of the statute, for a refund of the moneys so paid in by him. The result, therefore, is that there is still very grave doubt as to the construction of the law, and, in fact, there could not be a compliance with the provisions of the law as construed by the Court of Appeals as to the payment by it into the treasury, or a reclaim by it upon the Auditor.

Appellee has the right to seek the protection of the Federal courts, and if it had paid and sued for mandamus it would certainly have been met by the contention that this is a discretionary writ and only to be obtained in a very clear case and upon strict legal compliance with all the conditions precedent and this it could not have shown.

With reference to the writ of mandamus as a

remedy in cases involving disputes of fact, the Kentucky Court of Appeals, in Montenegro-Richm Music Company v. Board of Education, 147 Ky. 720, used the following language:

> "The Code provision confines the exercise of this remedy to cases in which an executive or ministerial officer declines or omits to perform an act, the performance or omission of which is enjoined by law. * * * It was not contemplated that in cases of this character disputed issues of fact should be settled, but that the rights of the parties should be determined by such issues of law as might be presented by the pleadings, or an agreed state of facts, or a state of facts about which there could be little dispute." Citing a number of authorities.

Again the court in the same case said:

> "It was not intended to aid a plaintiff in the enforcement of a mere contract right, or to take the place of the other remedies provided by law for the adjudication of disputed claims."

The foregoing opinion was cited with approval in Gordon, etc., v. Morrow, Governor, 186 Ky. 729.

But assuming only for the sake of argument that appellee had been able to find a purchaser for its warehouse receipt who was duly licensed and willing to *at once* withdraw the whisky, and appellee, therefore, could have the opportunity of starting its proceedings promptly; and had paid its money to the appellant warehouseman and had sued and maintained a suit for mandamus it is certain the Auditor and Attorney General would not have conceded that

appellee would be entitled to a warrant and such suit like the Security Producing & Refining Company case and the Frankfort Distilling Company case might have taken two years before a final decision was reached, during which time appellee would be out of the use of its money without interest and with the additional Federal questions involved the time of final decisions might have been even longer if the case was reviewed by writ of error.

But if finally appellee had been sustained and finally secured a warrant from the Auditor directed to the Treasurer for payment such warrant would only provide—not for the legal rate of interest nor the actual value of the money but for only 5% and the principal and interest would not, under the well-known and admitted practice in Kentucky, have been payable until from one to two years after the date of its issue, during all of which time the appellees would have been kept out of the use of their money.

It is, therefore, submitted that it was and still is proper for a court of equity to take jurisdiction and grant to the appellee in such case the only adequate, clear or complete relief to which it is apparently entitled.

(3) To Avoid a Multiplicity of Suits.

Beyond all these considerations there is a further equitable ground. The appellee had the right in the control of its own property, and had it been permitted to do so without interference of this law, it might

have sold its property in five or ten barrel lots to the drug trade, which has the license to tax pay and withdraw, but if it had done so it would have become necessary for it by agreement to make all these separate payments month by month to the warehouse company and depended upon the warehouse company to make the payments under a mistaken belief that the tax was due, and under protest, and, then, perhaps, to have sued the warehouse company, or endeavored to sue the Auditor upon each separate transaction within the time limitation on such actions, or by agreement to let the final purchasers, who had the right to withdraw, deduct from their purchase price the fifty cent tax, and pay it to the appellant warehouse, and then, as the owner withdrawing sue, and if successful refund to appellee in completion of the purchase price. This situation clearly is not like one tax definitely levied, paid at one time by the tax payer himself direct into the treasury or to the Auditor, but would lead to a multiplicity of suits and actions, and, therefore equity is an available remedy. Greene, Auditor v. L. & I. R'y Co., 244 U. S. 499.

(4) The Act is Void because of the Excessive Penalties and Equity only can afford Relief.

As stated *supra*, the Act, by Section five, for a failure to report and pay, provides a fine which shall

> "be not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due * * * shall be treated and considered as a separate offense."

Such a fine for one day's careless delay on even one barrel of whisky cannot be less than five hundred dollars, and before any suit could be tried through the warehouseman, the amount of the minimum fines would vastly exceed the value of the properties involved, and the Commonwealth, by failing to enforce the statute through the enforcement of the penalties, might so delay instituting suit or bringing it on for trial that there is no foretelling what the minimum or maximum penalties would amount to.

As we have pointed out, under the law of Kentucky the only person who can sue to recover back is the person who pays the money into the State treasury or to the Auditor, and this is alone required of the warehouseman. As further pointed out the owners of negotiable warehouse receipts, who wish to sell the same, would be deprived of their money and the tax through a deduction thereof instanter from the sale price of their warehouse receipts, and these receipts, being negotiable, the final owner thereof might wait years before he undertook to tax pay and

withdraw or remove his property; yet by reason of the penalty involved these burdens are thrown upon the present owner of the whisky, because no warehouseman can be found who would risk a test suit by refusing to report.

It is, therefore, submitted that this case comes clearly within the principles announced by this court in *Ex parte* Young (Minnesota Rate Case), 209 U. S. 145 to 147; and Oklahoma Operating Co. v. Love, 252 U. S. 331-336-337.

VII.

MOTION TO STAY PROCEEDINGS.

The appellants moved the lower court to stay further proceedings herein because of the pendency of a suit of Sol Rosenbloom & Company v. E. H. Taylor, Jr. & Sons, pending in the Franklin Circuit Court, Record, pp. 40 to 60. This motion is based on the amendment of March 4, 1913, to Section 266 of the Judicial Code. This amendment consisted of inserting in the fourth line after the words "in the enforcement or execution of said statute," the words, "or in the enforcement or execution of an order of an administrative board or commission acting under and pursuant to the statute of such state," and adding at the conclusion of the section the following words:

> "It is further provided that if before the final hearing of such application *a suit* shall have been brought in a court of the state *having jurisdiction thereof* under the laws of such state *to enforce such statute* or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court in the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state. Such stay may be vacated upon proof made after hearing and notice of ten days served upon the attorney general of the state that the suit in the state courts

is not being prosecuted with diligence and good faith." (Our italics.)

In the Judiciary Committee's report of February 27, 1913, Report No. 1584, the Committee recommended the amendment by the following statement:

> "It seeks to correct grave abuses by Federal judges in issuing interlocutory injunctions restraining state railroad commissions from executing the orders promulgated by them. The Federal court in the South Dakota district held that the provisions of Section 266 of the judicial Code were not broad enough to include orders promulgated by railroad commissions, state boards, or other tribunals fixing maximum rates under a state statute. Just complaint is made on account of the action of the Federal court in tying the hands of the railroad commissioners and preventing them from enforcing orders against railroads and express companies. * * *
>
> "The Committee is of the opinion that the statute should be broadened, so as to prevent this kind of interference with state officials who are performing their duties under the provisions of a statute enacted by the Legislature of a state."

The Report further quotes from the inaugural address of Governor Byrne, of South Dakota, delivered January, 1913, as follows:

> "It was the boast of the representatives of the railroads that in 13 minutes after the governor had signed at Pierre the act fixing passenger fares at 2 cents per mile the Federal judge at Sioux Falls had signed his sweeping order restraining the attorney general and all state attorneys from attempting to enforce it. Nearly

four years have passed since then, but we have not yet been able to learn from the court whether or not the fares fixed are reasonable. It is now nearly six years since the order of the board fixing 2½ cents per mile as the maximum charge for passenger fares was tied up by injunctions, yet in that time the court has not said whether such order is right or wrong. * * * It would seem that no effective regulation of freight and passenger rates within the state lines is possible so long as the lower Federal courts are thus permitted to annul and bring to naught all efforts on the part of the people of the state to secure relief."

A careful examination of the Congressional Record shows that both in the House and Senate the bill was passed upon the recommendation of the Report of the Committee, without debate or discussion of its purpose.

The plain context of the two amendments is that it relates to the Federal courts enjoining proceedings when a suit has been brought *to enforce* regulatory statutes of a state, not to suits brought by individuals to enjoin as to him upon his giving a bond a particular collection from him. As we interpret the spirit of the act it is that when a suit has been brought *to enforce* a statute and the state courts not only decline to enforce it, but on the contrary enter an order staying all enforcement, so that no possible damage can result to anyone affected by the statute, that then the Federal courts will stay their proceedings pending the final result of such stay and litigation in the state

court. Apparently the only class of cases in the mind of the Committee relate to suits to put into effect rates which if stayed in any court would necessarily result in general relief.

The "suit" relied on by appellants was not brought "to enforce such statute," and no "stay" or injunction for the plaintiff therein could in the slightest degree relieve the appellee herein or secure its property for it. The appellants' attempted construction of these words is wholly at variance with the terms of the law when they ignore the classification expressed by the word "thereof," for according to their construction, any kind of suit for any purpose in the State court of Kentucky would defeat the Federal jurisdiction.

The suit relied upon to stay the proceedings herein is not general but personal and may be differentiated by the courts on questions of not even general interest in this litigation, as will appear from an examination of the record filed.

The suit relied upon herein is that of Sol Rosenbloom & Company, plaintiffs, versus E. H. Taylor, Jr. & Sons, defendants, filed March 26, 1920, in the Franklin Circuit Court, which is a court of original and general jurisdiction. This suit is purely personal to the plaintiff and alleges that in December, 1919, the plaintiffs then desiring to export certain whisky had 2000 cases bottled in bond; that the whisky was withdrawn from the general bonded warehouse to a bonded bottling house and there regauged

and bottled, and at that time reported and paid the license tax of the Commonwealth of Kentucky at 2c a gallon, as shown by the Warehouse Company's report to the Auditor in January, 1920; that because plaintiffs could not secure transportation, the whisky was not exported, but that now plaintiffs "have complied with all the Government regulations concerning their right to sell and dispose of said whisky and with the necessary permits to do so they have sold the same for medicinal purposes and are entitled to its immediate possession for the purpose of shipment to purchaser." Plaintiffs further show that the defendant, E. H. Taylor, Jr. & Sons, is claiming some lien upon the whisky for a tax of 50c a gallon imposed by the Act of March 12, 1920, and "plaintiffs further charge that the bottled in bond whisky named having been transferred and removed once from the warehouse and the license tax of 2c per gallon having been paid, it cannot be subjected to further or other license tax, nor, as they are advised, can it be subjected under the terms of the Act of March 16, 1920, to the 50c per gallon tax."

The summons was served upon the defendant the same day and the Franklin Circuit Court met April 5th for 30 judicial days but no further step was taken in the case until the 8th day of May when the defendant, Warehouse Company, filed an answer admitting most of the allegations of the petition but alleging: "The defendant is informed that aside from the question of construction of the Act there may be a

question as to the validity of said tax, and to protect itself, as far as may be, submits that it is entitled to hold said whiskey until that question is determined by some court of competent jurisdiction."

The suit at bar was filed by appellee on April 29, 1920, and its motion for a preliminary injunction was set for and heard on May 14, 1920.

On the 12th day of May the plaintiffs filed a reply and what is styled a cross-petition and also an amended petition, in the body of which, but without mentioning them in the caption as parties, it is alleged that Charles I. Dawson, as Attorney General, and John J. Craig, as Auditor, are threatening to enforce the 50c tax; alleging the unconstitutionality thereof; that the Judge of the court is now absent from the county, and that unless the defendants, Dawson and Craig, are immediately restrained and enjoined from enforcing said Act the plaintiffs will suffer great and irreparable injury, and "especially so from the delay arising in giving notice of this application." The reply and amended petition were verified by J. H. Hazelrigg, one of the attorneys for the plaintiff. And on the same date, May 12th, Craig and Dawson were summoned, and the plaintiffs, without notice to the Taylors, defendants, as would be necessary under Section 275 of the Kentucky Code, which distinctly provides: "an injunction shall not be granted against a defendant who has answered, unless he has had notice of the application therefor," applied at once to the Clerk, Kelly C. Smithers, for a

temporary restraining order which is addressed to the defendants, Dawson and Craig, and provides:

> "You are hereby enjoined from requiring from the plaintiff or his agents or distiller in charge payment of the 50c per gallon tax on his whiskies described in the petition * * * until further orders of the court."

The bond required by the Clerk for this order was fixed in the penal sum of $2,000. It may be noted that the suit involves 2,000 cases of 3 gallons per case, or 6,000 gallons, and that the tax enjoined at 50c per proof gallon would amount to $3,000; and that notwithstanding the claim of irreparable damage from the delay of giving notice of the hearing, no relief was asked or granted as against the original defendants, Taylors, who were before the court and who were refusing to deliver the goods until they were protected.

This order of injunction was served on the Auditor and Attorney General on the same day it was issued, May 12, 1920, and on the following day, May 13, 1920, the Judge of the Franklin Circuit Court, certified under the Act of Congress the official character of the Clerk of the Court, and on the following day, May 14, 1920, the defendants herein, Dawson and Craig, filed the above record in support of their plea in abatement, or for a stay of this proceeding, of which notice had been given to them on April 28, 1920.

The restraining order issued by the Clerk could, under Kentucky Code Section 276, only be issued when it is made to appear by affidavit "that irreparable injury will result to the applicant from the delay of giving notice." The whole state of the pleadings shows that the officers of the State enjoined could take no action whatever to enforce this law until after the first day of June, 1920, but that the defendants, Taylors, who were not notified or enjoined, have refused to permit the plaintiffs' agents to remove and ship this tax paid whiskey. From this it is obvious that there could be no irreparable injury from the delay of giving notice to the defendants who were enjoined. Furthermore, the defendants who were enjoined may claim to be strangers to the action, and that as to them the injunction is absolutely nugatory because, as stated, they are not named in the caption of the amended petition nor in the caption of the reply and cross-petition, whereas Section 110 of the Code provides:

> "The caption of a pleading must state the name of the court in which the action is brought or pending, the names of the parties, designating who are plaintiffs and who are defendants, coupled with a word or short phrase describing the character of the pleading, with the exception: if there be several parties on either side a statement of the name of the plaintiff or defendant named in the petition, followed by the phrase • • • shall suffice, *except in petitions, cross-petitions and answers which make new parties to a set-off or counter-claim.*"

The amended petition comes within this class; the defendants enjoined were not named in the caption, and may claim to be strangers to the action. The rule is stated in Newman's Kentucky P. & P., Sec. 196, as follows:

> "It has been said that a statement in the body of the petition showing that an individual is a necessary party does not make him a party * * * his name should be in the style of the action, which names the parties plaintiffs and defendants at the head of a petition and also in the body thereof."

Without impugning the good faith of the proceeding it is sufficient to say that that it is not a suit brought to enforce a state law; that the State Officials are not properly made parties to the suit; that the matter in controversy is the right to the possession of *tax paid* whisky by one having the right to withdraw it; whereas the pending suit is for a mere "transfer *under bond* out of Kentucky" by a plaintiff not having the right to the possession of or to withdraw the whiskey; and that in the Franklin Circuit Court suit the relief is purely personal and may be, and probably is, based upon an entirely different ground, viz.: that the whisky was tax paid prior to the attaching of the 50c tax imposed by the Vance Bill. The proceeding in the Franklin Circuit Court could not have given the appellee herein any relief whatever against the appellant, Louisville Public Warehouse Company, which had declined to surren-

der the appellee's property unless it was ordered to do so by a court of competent jurisdiction.

It further appeared (affidavit of T. K. Helm filed herein), that S. Rosenbloom had instructed his counsel to dismiss his suit in the Franklin Circuit Court but was unable to enter the order except by agreement of the Commonwealth during the vacation of that court, but proposes to dismiss it at the September term; and that Rosenbloom's counsel have expressed the intention of removing the pendency of that suit as any interference with the suit at bar, and are now merely suggesting to their clients that it may be prosecuted on the one special ground of the right to withdraw because that whisky has paid the 2c tax and is, therefore, not subject to the 50c tax.

It is, therefore, submitted that this court should not stay its proceeding but proceed to a determination of the merits of the appellee's rights.

WHEREFORE, the premises considered the appellee respectfully requests that the judgment be affirmed.

LEVI COOKE,
EDMUND F. TRABUE,
JOHN C. DOOLAN,
JAMES P. HELM, JR.,
THOMAS KENNEDY HELM,
Counsel for Appellee.

APPENDIX.

AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whisky or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the taxes so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act; and declaring an emergency to exist.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§1. Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whisky or brandy or other species of double stamp spirits, in this state; and every corporation, association, partnership and individual engaged in the business of

owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky.

§2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this state, wherein distilled spirits known as whisky or brandy or other species of double stamp spirits are stored, shall, on or before the first day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total amount of such spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly reports to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such person, or, in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this Act becomes effective to the date of making such reports; and each monthly report thereafter

shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the warehouse to which same has been transferred, the quantity thereof and the serial number of each of the packages so transferred.

§3. Every person, corporation, association or partnership operating, owning or controlling such bonded warehouses, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this state, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehouseman used in connection therewith; and in all cases where the spirits so removed or trans-

ferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth.

§4. Every corporation, association, partnership and individual engaged in distilling spirits known as whisky or brandy or other species of double stamp spirits in this state, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this state shall file monthly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

§5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association or partnership is in default shall be treated and considered as a separate offense.

§6. The tax herein provided for, when collected, shall be distributed as follows: To the State Road Fund, sixty-five per cent thereof; to the General Expenditure Fund, thirty-five per cent thereof.

§7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships or associations engaged in business covered by this Act; and all Acts in conflict therewith are hereby repealed, and especially there is hereby repealed Chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

§8. Whereas, many persons, corporations, associations and partnerships are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from

the bonded warehouses and disposed of, without the state securing an adequate license tax thereon, an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor.

PROVISIONS OF KENTUCKY CONSTITUTION.

Sec. 13. No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.

Sec. 14. All courts shall be open and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale denial or delay.

Sec. 171. The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws. The General Assembly shall have power to divide property into classes and

to determine what class or classes of property shall be subject to local taxation. Bonds of the State and of counties, municipalities, taxing and school districts shall not be subject to taxation.

Sec. 172. All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished, as may be provided by law.

Sec. 174. All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises.

Sec. 181. The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises,

stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions.

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(When the above cases were first decided the leading opinion was rendered in the Frankfort Distilling Company case and the Security Producing & Refining Company case decided on its authority as a companion case, but on the petition for rehearing the chief opinion was written in the Security Producing & Refining Company case and the same conclusion announced in the companion case of Frankfort Distilling Company.)

First Opinion March 9, 1920. | Opinion on Rehearing Nov. 16, 1920.

The Frankfort Distilling Company is a corporation organized under the laws of the State of Kentucky, and was liable for a license tax on its capital stock under Section 4189a, Kentucky Statutes, up until the year 1918, at which time it became liable under Section 4214a-1, Kentucky Statutes, for a license tax of two (2c) cents on every proof gallon of distilled spirits shown by its official records to be in its possession. The State Tax Commission in the latter part of 1917 furnished to the Frankfort Distilling Company the necessary blank required by Section 4189d, Kentucky Statutes, on which to make its report for a license tax based upon its authorized stock. Shortly thereafter and in due time the corporation returned the blank properly filled out, signed

"The Security Producing and Refining Company, a corporation, was assessed by the State Tax Commission and paid into the State Treasury a license tax $750.00, for the year 1918, and a like amount for the year 1919, under Sections 4189a and 4189c, Kentucky Statutes, and is now suing and is granted a mandamus by the lower court against the Auditor, requiring him to draw his warrant on the State treasury for the $1,500.00 paid by it as tax when no license tax was due by said company at that time on this account. The Auditor is prosecuting this appeal. Section 162, Kentucky Statutes, provides: 'when it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on

and verified to the Tax Commission, which body by the aid of the information contained in the report assessed the Frankfort Distilling Company under Sections 4189a and 4189c, a license tax of $125. This fact was certified by the Tax Commission to the Auditor, and the Commission notified the Frankfort Distilling Company of the assessment and the amount thereof. The Auditor certified the amount of the assessment to the Treasurer. The Distilling Company made no objection whatever to the assessment, and shortly thereafter paid the $125 into the State Treasury. About the first of the year 1919, a similar blank was sent to the Distilling Company, which was filled out and returned in the same manner and the tax paid in 1919. Thereafter on the 15th of August, 1919, the Distilling Company instituted this action against the Auditor to recover the $250 paid in by it on such license tax, praying a writ of mandamus against the Auditor, requiring him to draw his warrant in favor of the plaintiff, Distilling Company, upon the treasurer of the Commonwealth for said sum.

the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed.' In construing this section of the statutes we held in Greene, Auditor, v. Taylor, 184 Ky. 739, 'that taxes voluntarily paid to counties, cities, towns and county officers, collecting the State's revenues *and other collecting officers*, can not be recovered, although not due, and paid under a mistake of law. City of Louisville v. Anderson, 79 Ky. 334; L. & N. R. R. Co. v. Hopkins Co., 87 Ky. 605; L. & N. R. R. Co. v. Commonwealth, 89 Ky. 531.

"It is conceded that the Security Producing & Refining Company paid, through mistake of law, the taxes for 1918 and 1919 under Sections 4189a and 4189c, when it was required to and did pay to the State a license tax equal to one per centum of the

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Greene as Auditor filed his answer, to which the Distilling Company interposed a general demurrer, which was overruled. The Distilling Company then filed reply, completing the issues. To the reply the Auditor filed a general demurrer, which was overruled, and the Auditor excepted. The facts being admitted, neither party desired to plead further, and the court entered a final judgment granting the mandamus requiring the Auditor to draw his warrant on the Treasurer for $250 in favor of the Distilling Company for the license tax paid in by it. The Auditor prosecuted this appeal.

It is admitted that the Frankfort Distilling Company is a corporation and that it was required in the years 1918 and 1919 to pay a license tax of two (2c) cents on every proof gallon of distilled spirits shown by its official record to be in its possession on the date fixed by law, under Section 4214a-1, Kentucky Statutes; that it was not liable for the license tax imposed by Sections 4189a and 4189c, Kentucky Statutes, and that it should not have paid into the treasury the $250 which it now seeks to recover. On market value of the crude petroleum produced by it. It thus paid two license taxes when it was liable for only one. When it became liable for the license tax under Section 4223c on its oil production, it was by the provisions of Section 4189a relieved of liability for a license tax upon its capital stock, but it paid both these taxes and now seeks to recover the sum paid as the latter.

"Appellee corporation insists that the attempted assessment of the taxes by the Tax Commission against the corporation was wholly without authority and, therefore, void.

"Fundamentally no tax can be levied or collected by the State except under and by authority of legislative enactment. Money otherwise received by the State as taxes is unwarranted, and should be returned to the payor upon his compliance with the provisions of Section 163 Kentucky Statutes. It is admitted that the money sought to be recovered in this action, though paid as taxes, was not due as such, and the Security Company by mistake of law paid the same though unwilling to do so, had it comprehended its legal rights. The attempted

these facts the Distilling Company insists that it should be granted a mandamus requiring the Auditor to draw his warrant in its favor for the money paid in by it as a license tax when no such tax was due, as provided by Section 162, Kentucky Statutes.

One who pays into the State Treasury money as tax when none is due, may recover the same, if the payment was not made voluntarily and the tax was not assessed and levied by a taxing authority having power to assess the same, other than the Auditor. If the tax sought to be recovered was voluntarily paid into the treasury of the State, no recovery can be had; and it was voluntariiy paid if the assessment could not have been collected by distraint, but taxes are involuntarily paid if the same are collectible by distraint. Greene, Auditor, v. Taylor, 184 Ky. 730.

The tax here sought to be recovered is not such as could have been distrained, but the Commonwealth could have enforced collection, if at all, only by an action at law. This would not have amounted to distraint; and taxes collectible by action only, as in this case, and paid without such assessment made by the State Tax Commission was unwarranted and void because no such license tax was due at that time from the corporation. Money so paid as taxes should be returned to the payor on his timely application. The Statutes, Section 162, which provides that when it shall appear to the Auditor that money has been paid into the treasury as taxes when none were in *fact* due, *shall* be returned to the payor, was intended to cover all such cases. Such improper payment of money into the treasury as taxes can not but appear to the Auditor by a glance at the statutes. He does not have to go into or review the attempted assessment made by the State Tax Commission but need only to acquaint himself with the facts and look at the statutes imposing the tax on corporations to have it certainly appear to him that money has been paid into the treasury as taxes by the corporation when no such taxes were in fact due. When it does so appear to the auditor it is his duty to and he may be compelled by mandamus to issue his warrant on the treasury in repayment of the same. In every case where money

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Frankfort Distilling Company.

First Opinion March 9, 1920. Opinion on Rehearing Nov. 16, 1920.

suit, are paid voluntarily and are not recoverable by the payor or any one for his benefit, certainly so, if it appear that a regular assessment was made by a duly constituted taxing authority having such matters in charge. The Auditor has no authority whatever to review or correct assessments made by properly constituted taxing authorities, and he can not therefore be required by mandamus to draw his warrant upon the treasurer for the return of money paid in as taxes, even where none were due on a regularly made assessment of a duly authorized taxing agency. A corporation which is requested to send in a tax list so that it may be assessed for a license tax, which corporation voluntarily responds to such request and sends in the tax list on which the taxing authority assesses such tax and notifies the corporation of its action, and the amount of its assessment, and the corporation acquiesces in the assessment and pays in the money without protest, the Auditor is without authority to correct the assessment and can not therefore be required by mandamus to draw his warrant on the treasury for is received as taxes when not authorized by statute or in violation thereof the duty immediately devolves on the Auditor, upon proper application by the person paying the same, to issue his warrant on the treasury in repayment of said sum to the payor. It can appear to the Auditor that money has been paid into the treasury as taxes when none are due in at least two ways: (1) When there is no warrant in the statutory law of the State for the levy or collection of such taxes; (2) when the improper and unwarranted payment is made under a void or unenforceable statute or through mistake or inadvertence of the taxpayer, *directly into the treasury or to the Auditor.* In either of such case it can not fail to appear to the Auditor upon proper investigation that money has been paid into the treasury as taxes when no such taxes were in fact due, and it then becomes his duty to and he *shall* issue his warrant on the treasury for the repayment of the money so improperly paid in behalf of the person who paid the same, provided *proper application is made therefor.* Manifestly the purpose of the Legis-

the amount of money thus paid in. This rule is rested upon another rule which gives each litigant only one day in court and if he refuses to accept his day in court when his attention is called to it, and to litigate the matter when it is open for litigation, he will not be heard to complain or be allowed to litigate after the matter has been finally determined. When the Tax Commission requested the corporation to send in its tax list so that the license tax might be ascertained, the corporation should have refused so to do and it would not have been liable had it done so in this instance; and after it sent in its tax list and the Taxing Commission assessed the corporation with the license tax and notified it of such action, and the amount of the tax, it should have asked a rehearing before the Board, and it was entitled to have a rehearing had it requested one, and when the Auditor certified the amount to the treasurer the corporation *had yet another chance to avoid payment, as it may then have enjoined collection of the taxes*, but after all these steps had been regularly taken and the money paid into the treasury the purpose of the legislature in passing Section 162, *supra*, was to secure the return of all money paid into the treasury as taxes by taxpayers through mistake, inadvertence, misapprehension of the law, or under void or unenforceable statutes, for it expressly declares it to be the duty of the Auditor to issue his warrant in every case where it shall appear to him that the State holds money rightfully and in good conscience belonging to another.

"Following this rule, the Auditor should have promptly issued his warrant on the treasury for $1,500 in favor of appellee, Security Producing and Refining Company.

"The Auditor can not act arbitrarily in the payment of money but will be held to strict accountability for all money paid out by him. In doubtful cases he should refuse payment until the question has been determined by the courts. But in every case, such as this, where it is made to appear to the Auditor that money has been paid into the treasury as taxes when no such taxes were in fact due, and demand has been made for its return *within the time and in the manner* provided

ury and mingled with other public monies and distributed by the State, it was too late for the corporation to take the initial step to recover it.

It follows, therefore, that the chancellor erred to the prejudice of the appellant in granting the mandamus, requiring the Auditor to draw his warrant on the treasurer for the money paid as tax when none were due. (Our italics.)

The appeal is granted and the judgment reversed with direction to dismiss the petition.

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For Appellee.

A Copy; Attest,
ROY B. SPECK,
Clerk Court Appeals.
A.C.

by Section 163, Kentucky Statutes, he should promptly draw his warrant on the treasury and return to the payor the money thus received, *but* the Auditor is not required to go into or review assessments of *taxing agencies* to determine whether the payment is due or not.

"The cases of Bank of Commerce of Louisville v. Stone, 108 Ky. 427, and Greene, Auditor, v. Taylor, *supra*; Louisville City National Bank v. Coylter, 112 Ky. 584; County v. Bosworth, 160 Ky. 312; Louisville Gas Co. v. Bosworth, 169 Ky. 824, and all other cases announcing a similar rule, in so far as they conflict with the construction herein given Section 162, Kentucky Statutes, are expressly overruled. We can think of no reason why the State should not be required to live up to the same moral standards demanded of individuals and repay money received by it through mistake or inadvertence. Any other rule is unconscionable and bad in morals if not actually dishonest. The State should not merely because it has the power to declare the law, take to itself money rightfully and in good conscience belonging to its

citizens and taxpayers without just return. Such a statute would be both arbitrary and unjust and we can not conceive of the great law-making department of this Commonwealth contemplating such a thing by the enactment of Section 162, Kentucky Statutes. Such a purpose, if expressed in a statute would be inimical to all the past declared public policy of the State. The lower court did not err in awarding the writ or mandamus against the Auditor compelling him to draw his warrant on the treasury in favor of the plaintiff and appellee and the judgment is affirmed." (189 Ky. 565.)